TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 3, 1944.

—2767

[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

Docket No. 45197

LENA ROSENMAN and THE NATIONAL CITY BANK OF NEW YORK, a corporation, as Executors of the Last Will and Testament of Louis Rosenman, deceased, Plaintiffs,

against

THE UNITED STATES OF AMERICA, Defendant.

PETITION—Filed May 25, 1940

To the Honorable Court of Claims of the United States and the Honorable Judges Thereof:

The plaintiffs, Lena Rosenman and The National City Bank of New York, a corporation, as executors of the last will and testament of Louis Rosenman, deceased, respectfully represent to this Honorable Court, upon information and belief, as follows:

1. At all times hereinafter mentioned the plaintiff Lena Rosenman was and now is a resident of the Borough of Brooklyn, County of Kings, State of New York, and the plaintiff The National City Bank of New York was and now is a national banking association duly organized and existing under the laws of the United States with its prin-
[fol. 2] cipal office at 55 Wall Street, Borough of Manhattan, City, County and State of New York.

2. Louis Rosenman died December 25, 1933, a resident of the Borough of Brooklyn, County of Kings and State of New York, leaving a last will and testament, which was duly admitted to probate in the Surrogate's Court for the County of Kings, State of New York, to which jurisdiction in that behalf belonged, and on February 7, 1934, letters testamentary were duly issued out of said court to the plaintiffs, Lena Rosenman and The National City Bank of New York, and Samuel Rosenman, who duly qualified as executors of the said last will and testament and at all times hereinafter mentioned until May 10, 1940, acted as such executors. On May 10, 1940, the Surrogate's Court for the County of Kings, State of New York, revoked the letters testamentary issued to Samuel Rosenman, as an

executor, by an order bearing that date, which said order directed Lena Rosenman and The National City Bank of New York to continue to act as such executors, and they have been ever since and still are duly qualified and acting as such executors. A duly authenticated copy of the record of the appointment of the plaintiffs as such executors is filed herewith pursuant to Rule 9. Said appointment is unrevoked and remains in full force and effect.

3. The plaintiffs have a just claim against the defendant for the sum of $24,717.12, together with interest as provided by law, which said sum was paid by the said executors of the estate of Louis Rosenman, deceased, to the defendant through the duly appointed, qualified and acting United States Collector of Internal Revenue for the First [fol. 3] District of New York, as hereinafter set forth. The claim is founded upon the laws of the United States relating to internal revenue, to wit: the Revenue Act of 1926 as amended and the Revenue Act of 1932 as amended, particularly the sections of said Acts relating to federal estate tax, being Sections 300-325 of the Revenue Act of 1926 and Sections 401-403 of the Revenue Act of 1932. This suit is filed under Sections 145 and 156 of the Judicial Code and Sections 3772 and 3313 of the Internal Revenue Code.

4. Pursuant to an extension granted by the United States Commissioner of Internal Revenue, the time within which the United States estate tax return of the estate of Louis Rosenman, deceased, might be filed was duly extended to and including February 25, 1935.

5. On December 24, 1934 the said executors of said estate paid to or deposited with the duly appointed, qualified and acting United States Collector of Internal Revenue for the First District of New York the sum of $120,000, to be held for the account of said executors and to be disposed of as follows: to be applied, to the extent necessary therefor, in payment of such United States estate tax as might be shown to be due and payable upon the United States estate tax return thereafter to be filed by said executors, and the balance of said sum to be repaid and refunded to said executors.

6. On February 25, 1935, said executors duly executed and filed the United States estate tax return of said estate, in accordance with the provisions of law in that regard and

the regulations of the Secretary of the Treasury established in pursuance thereof. The estate tax shown to be due and payable on said return was $80,224.24.

[fol. 4] 7. Thereafter the tax shown to be due on said return, as aforesaid, was assessed and the said collector, on or about March 28, 1935, applied $80,224.24 of the $120,000.00 paid to or deposited with him by said executors, as aforesaid, in satisfaction of said assessment.

8. On March 26, 1938, said executors duly filed with the Commissioner of Internal Revenue, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a claim for the refund of $39,775.76, being the balance of the said sum of $120,000.00 remaining after the application of $80,224.24 thereof to the payment of the assessment of federal estate tax shown to be due on the said estate tax return, as hereinabove set forth, and therein duly demanded the refund and repayment of said sum.

9. In April 1938, the Commissioner of Internal Revenue assessed an additional federal estate tax of $48,534.84 against the said executors of said estate, in addition to the tax of $80,224.24 shown on the return, as aforesaid, and on April 16, 1938, the said collector applied said balance of $39,775.76, hereinabove referred to, toward the payment of said additional assessment, and on April 26, 1938, served upon said executors a notice and demand for payment of the further sum of $8,759.08 in payment of the balance of said additional assessment, together with interest of $1,738.26, a total of $10,497.34, and in and by said notice and demand the said collector demanded the immediate payment of said sum and notified the said executors that if said sum were not paid within thirty days liability for interest thereon at the rate of 6% per annum would be [fol. 5] incurred. The said executors, acting under duress of said threat and in order to avoid liability for interest on said sum of $10,497.34, duly paid the same to the said collector on April 27, 1938.

10. The assessment of said additional estate tax, as aforesaid, was based upon the determination of the Commissioner of Internal Revenue that the said decedent's gross estate was $1,706,596.10; that the allowable deductions (not including specific exemptions) were $361,361.71;

that for the purpose of the federal estate tax imposed by the Revenue Act of 1926 the net estate was $1,245,234.39; that for the purpose of the federal estate tax imposed by the Revenue Act of 1932 the net estate was $1,295,234.39; and that the allowable credit for state, estate, inheritance, legacy and succession taxes was $53,335.45.

11. In the determination of the net estate for the purposes of the federal estate taxes imposed by the Revenue Acts of 1926 and 1932, hereinabove referred to, the Commissioner of Internal Revenue erroneously and illegally failed to allow the following deductions, amounting to $173,169.14, which properly were allowable in computing the net estate subject to tax under said Acts:

Executors' commissions in the sum of	$91,685.45
Attorneys' fees in the sum of	31,000.00
Amount paid in final satisfaction of claims of Martin Rosenman against the estate	25,000.00
Miscellaneous expenses incurred in the administration of the estate	25,483.69
	$173,169.14

[fol. 6] 12. The federal estate tax due from and payable by said estate under the provisions of the Revenue Act of 1926 was $10,853.04, and the additional federal estate tax due from and payable by said estate under the provisions of the Revenue Act of 1932 was $94,927.18, making a total federal estate tax due from and payable by said estate of $105,780.22.

13. On May 20, 1940 the plaintiffs duly filed with the Commissioner of Internal Revenue, in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, a claim for the refund of the tax and interest of $24,717.12 paid as aforesaid, and therein duly demanded the refund and repayment of said amount, together with interest as provided by law.

14. On May 26, 1938 the Commissioner of Internal Revenue denied and rejected the said claim for refund filed on March 26, 1938, as aforesaid, and notified the said executors to that effect by a notice mailed by registered mail on said date. On May 21, 1940 the Commissioner of Internal

Revenue denied and rejected said claim for refund filed on May 20, 1940, as aforesaid, and notified the plaintiffs to that effect by a notice mailed by registered mail on said date. No part of the sum so claimed in either of said refund claims has been credited, refunded or repaid to the plaintiffs or to anyone for their account.

15. The plaintiffs and each of them have always borne true allegiance to the Government of the United States and have not in any way aided, abetted or given encouragement to rebellion against said Government. They have not, nor [fol. 7] has either of them, assigned this claim, or any part thereof, and the plaintiffs are justly entitled to the amount herein claimed, after allowing all just debts, credits and off-sets. No action upon the claim upon which this suit is founded, other than that hereinabove set forth, has been taken before the Congress or in any department of the Government of the United States or in any court.

Wherefore, the plaintiffs demand judgment against the defendant, The United States of America, for the sum of $24,717.12, together with interest as provided by law.

Mitchell, Taylor, Capron & Marsh, Attorneys for Plaintiffs, Office and Post Office Address, 20 Exchange Place, Borough of Manhattan, City and State of New York.

George Craven,
Of Counsel.

[fol. 8] *Duly sworn to by W. G. Chisolm. Jurat omitted in printing.*

[fols. 9-10] General Traverse—Filed June 7, 1940

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Samuel O. Clark, Jr., Assistant Attorney General.
JWH FKD.

ARGUMENT AND SUBMISSION OF CASE

On November 4, 1943, the case was argued and submitted on merits by Mr. Carter T. Louthan for plaintiff, and by Mr. J. W. Hussey for defendant.

[fol. 11] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.**—Filed February 7, 1944

Mr. Carter T. Louthan for the plaintiffs. *Messrs. Mitchell, Taylor, Capron & Marsh* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. The plaintiffs, Lena Rosenman, a resident of Brooklyn, New York, and the National City Bank of New York, a national banking association with its principal office in New York City, are the duly qualified and acting executors of the last will and testament of Louis Rosenman who died a resident of King's County, the State of New York, December 25, 1933.

2. December 11, 1934, the plaintiffs requested an extension of time within which to file the Federal estate tax return for the estate and on December 15, 1934, the time to file such return was extended by the Commissioner [fol. 12] of Internal Revenue to February 25, 1935, the letter granting such extension reading in part as follows:

> Reference is made to your application of December 11, 1934, for an extension of time within which to file the Federal Estate Tax return, Form 706, for the above-named decedent. As the facts show that it is impossible to file a reasonably complete return on the due date, an extension to February 25, 1935, is hereby granted. No further extension of time will be granted and a re-

turn as complete as possible should be filed before the expiration of this extension period.

The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

3. December 24, 1934, plaintiffs delivered to the collector a check for $120,000 accompanied by a letter of transmittal which read as follows:

Henry Hetkin, Esq., of 70 Pine Street, New York, N. Y., and this office represent Mrs. Lena Rosenman, Mr. Samuel Rosenman and The National City Bank of New York, the executors of the Estate of Louis Rosenman, who died on December 25, 1933. By letter from the Commissioner of Internal Revenue to the executors, dated December 15, 1934, the time to file the Federal Estate tax return for this estate has been extended to February 25, 1935.

We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax. Kindly acknowledge receipt of this check on the enclosed carbon of this letter, and return that carbon to us by the messenger; also kindly send us your usual receipt, in duplicate as soon as convenient.

This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due.

4. Account 9 is a suspense account in the books of the collector of internal revenue for the first district of New York to which monies received in connection with Federal estate [fol. 13] taxes and other miscellaneous taxes are deposited if no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which

are applied immediately to some account on the assessment list.

5. At the time the collector received such sum of $120,000 from plaintiffs, no assessment of estate tax was outstanding against the estate of Louis Rosenman, and on December 26, 1934, the collector placed the sum of $120,000 to the credit of that estate in Account 9 in his books. February 25, 1935, plaintiffs executed and filed the United States estate tax return of the estate which showed an estate tax of $80,224.24 to be due and payable. Upon the receipt of such estate tax return, the amount of $120,000 standing to the credit of the estate in Account 9 on the collector's books was identified. The tax of $80,224.24 shown to be due on the return was assessed in March 1935, and on March 22, 1935, the amount of $120,000 was classified and $80,224.24 thereof was credited against the assessment of $80,224.24. The balance of such amount of $120,000, that is, $39,775.76, remained in Account 9 to the credit of the estate until April 1938, as shown by findings 8 and 9.

6. March 28, 1935, the collector forwarded to plaintiffs a notice and demand for estate tax which showed that the $120,000 paid in December 1934 had been credited to Account 9 and that $80,224.24 thereof had been applied in satisfaction of the tax of $80,224.24 assessed on the Federal estate tax return.

7. March 26, 1938, plaintiffs filed with the collector a claim for the refund of $39,775.76, the difference between the amount of tax shown to be due on the estate tax return filed for the estate and the $120,000 paid to the collector, on the ground that the notice and demand forwarded to the plaintiffs by the collector on March 28, 1935, showed that $39,775.76 was due and owing to the plaintiffs.

8. On audit of the Federal estate tax return filed by the plaintiffs for the estate, the Commissioner determined that the gross estate was $1,706,596.10, that the allowable de- [fol. 14] ductions exclusive of the specific exemption were $361,361.71, resulting in a net estate of $1,245,234.39 for the purposes of the tax imposed by the revenue act of 1926, and a net estate of $1,295,234.39 for the purposes of the tax imposed by the revenue act of 1932, and that the total net tax, after allowing a credit of $53,335.45 for State

estate and inheritance tax payments, was $128,759.08. After taking into account the estate tax of $80,224.24 shown to be due on the return, an estate tax deficiency of $48,534.84 was determined to be due by the Commissioner and notice thereof was mailed to plaintiffs. No appeal was filed by plaintiffs with the Board of Tax Appeals within the ninety-day period allowed for such filing and the deficiency of $48,534.84 was assessed in April 1938.

9. In April 1938 the collector applied the balance of $39,775.76 standing to the credit of plaintiffs in Account 9 in partial satisfaction of the deficiency of $48,534.84 so assessed against plaintiffs. April 16, 1938, the collector demanded payment of the balance of the assessment, that is, $8,759.08, together with interest thereon of $1,738.26. April 22, 1938, plaintiffs paid to the collector the total amount so demanded of $10,497.34.

10. May 26, 1938, the Commissioner rejected the claim for refund filed by plaintiffs March 26, 1938, on the ground that a deficiency of $48,534.84 in Federal estate tax had been assessed and that accordingly there was no overpayment and notified plaintiffs to that effect by notice sent by registered mail on that date.

11. May 20, 1940, plaintiffs filed with the collector a claim for refund of $24,717.12 of the estate tax theretofore paid on the grounds that in computing the net estate for the purposes of the taxes imposed by the revenue acts of 1926 and 1932 additional deductions should be allowed for $91,685.45 of executors' commissions, for $31,000 of attorneys' fees, for $25,483.69 of miscellaneous administration expenses, and for $25,000 paid to Martin Rosenman in settlement of his claims. May 22, 1940, the Commissioner rejected that claim on the ground that no evidence had been submitted in support of the deductions claimed and on the further ground that the tax in excess of $10,497.34 had been paid more than three years prior to the filing of the claim, [fol. 15] and notified the executors to that effect by notice sent by registered mail on that date.

12. The parties to this suit have stipulated that the amounts paid by plaintiffs and allowed by the Surrogate's Court as administration expenses which heretofore have not been allowed as deductions are properly allowable as deductions in determining the net estate of the decedent

for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932 as follows:

Executors' commissions	$79,030.26
Attorneys' fees	31,000.00
Miscellaneous expenses	25,483.69

13. In determining the net estate of the decedent for the purposes of the Federal estate taxes imposed by the revenue acts of 1926 and 1932, the Commissioner did not allow as a deduction the sum of $25,000 which was paid to Martin Rosenman by the estate as shown by subsequent findings.

14. The decedent's only son, Martin Rosenman, for whose primary benefit one-sixth of the decedent's estate was bequeathed in trust under his will (the other five-sixths being bequeathed in trust for the primary benefit of his widow and four daughters) filed two claims against the decedent's estate. The first claim dated February 27, 1934, read as follows:

> I hereby make demand upon you for the delivery to me as soon as practicable, the following securities with uncollected coupons attached, which were held by the deceased for my account: [Then followed a list of fourteen securities.]

The second claim, dated July 23, 1934, read as follows:

> I hereby make demand upon you for interest, dividends and proceeds of sales with interest from this date, of the following securities belonging to me or having belonged to me until their sale, which were in the possession of the late Louis Rosenman. He collected these items and failed to turn them over.
>
> [Then followed a list of the same securities as shown in the letter of February 27, 1934, with two or three additions.]
>
> [fol. 16] The basis of this claim is practically the same as that of my letter of February 27, 1934. These items may all be found in the check book of the deceased under my name and in his ledger as well.
>
> You will find that the deceased, on making transfer of securities often reserved for himself all coupons maturing within two months of the transfer.

The contention of Martin Rosenman was that the decedent had made gifts of these securities to him (Martin)

during the decedent's lifetime, and that these securities and the proceeds therefrom were in the possession of the decedent at the time of his death, but were held by the decedent at that time for Martin's account. The total amount of Martin's claims against the estate was approximately $167,000, such amount being the approximate value at the time of decedent's death of the property which Martin claimed.

15. On decedent's death the securities claimed by Martin Rosenman were found in two safe deposit boxes of the decedent, to one of which Martin had access. Some evidence existed which tended to support the claim, but after making as thorough investigtion as it was possible to make, including examining the decedent's records, checking his office files, interviewing the bookkeeper who kept a record of his securities and the income therefrom, and examining Martin's income tax returns which were prepared prior to the decedent's death and signed by the decedent as Martin's agent, plaintiffs concluded that Martin did not have a just and valid claim for the securities and cash to the extent claimed and accordingly notified him October 25, 1934, that the claim was rejected.

Thereafter further negotiations were carried on between the parties for a settlement of the controversy with the result that on June 8, 1935, an agreement was reached under which plaintiffs agreed, subject to the approval of the Surrogate's Court, to pay, and Martin agreed to accept, $25,000 in full payment and satisfaction of his (Martin's) claims. In presenting the matter to the Surrogate's Court for approval, plaintiff stated they had concluded the compromise was fair and reasonable for the following reasons:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused in- [fol. 17] come tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year, which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned. Your petitioners were also influenced by the fact that the adult benefici-

aries substantiated the contention of the said Martin Rosenman to the effect that the decedent intended to make a gift of the said securities, being motivated by a desire to equalize gift provisions which he had already made for the benefit of his other adult children, and moreover, your petitioners are informed and believe that the other adult children acknowledge that provisions were made for their benefit by the decedent which have not been otherwise equalized with respect to said Martin Rosenman. Your petitioners were also greatly influenced in arriving at their conclusion that the said offer of compromise was just, in that it would tend to preserve a more harmonious family relationship, avoid the uncertainties of litigation involving a possible maximum loss to the Estate in excess of $167,000, and save the expense and avoid the danger of protracted litigation. Accordingly, when your petitioners ascertained that all of the adult beneficiaries interested in said Estate agreed with the foregoing, they entered into the compromise agreement which, as aforesaid, is hereto annexed and made a part hereof.

16. Pursuant to the provisions of section 19 of the Decedent Estate Law of New York, a formal written agreement setting forth the terms of the settlement referred to in the preceding finding was entered into, subject to the approval of the Surrogate's Court, which was executed by the executors, Martin Rosenman, all adult beneficiaries of the estate, and the guardians representing an infant and unknown beneficiaries. The plaintiffs filed a verified petition in the Surrogate's Court, Kings County, New York, to which were attached such agreement of compromise and copies of the claims of Martin Rosenman. Such petition set forth the facts relating to Martin Rosenman's claims and the propriety of the compromise and described the infant and adult persons, as well as the unborn and unknown persons, whose interests would or might be affected by such compromise, [fol. 18] and prayed that the Court take such action and make such decrees as might be necessary to approve such compromise and make it binding upon all parties interested in the estate.

17. The Surrogate's Court appointed a special guardian to represent the interests of the infant beneficiary of the estate who was over fourteen years of age and a special

guardian to represent the interests of the other infant and unborn and unknown beneficiaries of the estate and appointed a referee to ascertain the jurisdictional facts and to hear and determine whether the proposed compromise was a proper one and to report to the Court. The referee held hearings at which evidence was introduced as to whether it was a fair compromise. One of the guardians originally filed a report objecting to the proposed compromise, but later withdrew such objection and the other guardian filed a report approving the proposed compromise. After the hearings and in accordance with the instructions of the referee, both guardians signed the compromise agreement on behalf of their wards, subject to the approval of the Surrogate's Court. The referee reported to the Surrogate's Court that such proposed compromise was a proper one and that it should be approved. The Surrogate's Court entered a final decree in the proceeding approving the compromise and ordering the executors to pay $25,000 to Martin Rosenman in full satisfaction of his claims upon the delivery by Martin Rosenman of an instrument acknowledging the receipt of such sum in full satisfaction of his claims. Such $25,000 was paid to Martin Rosenman by the executors, and Martin Rosenamn delivered an instrument acknowledging receipt of such sum in full satisfaction of his claims.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a matter of law that the plaintiffs are entitled to recover.

Entry of judgment will be withheld to await the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner as to the correct amount due plaintiffs, computed in accordance with this opinion.

[fol. 19]

Opinion

Whitaker, Judge, delivered the opinion of the court:

Plaintiffs, the executors of the last will and testament of Louis Rosenman, sue to recover estate taxes alleged to have been erroneously exacted. The claim is based upon their right to deduct from the gross estate sums for executors' commissions, attorneys' fees, miscellaneous expenses,

and an item of $25,000 paid to Martin Rosenman in settlement of a claim he presented against the estate.

The items of executors' commissions, attorneys' fees, and miscellaneous expenses are not in dispute, but defendant denies that the estate is entitled to the deduction of the $25,000 paid to Martin Rosenman in settlement of his claim. The defendant also says that the plaintiffs are barred from collecting all of the amount claimed, except $10,497.34, because the balance is barred by the statute of limitations on the filing of claims for refund.

The latter defense we shall discuss first.

Louis Rosenman died on December 25, 1933. The executors were due to file an estate tax return on December 25, 1934, but as this date approached plaintiffs saw that it would be impossible by that time to file an accurate return; they, accordingly, on December 11, 1934, requested an extension of time. The Commissioner granted an extension until February 25, 1935, but in his letter, dated December 15, 1934, granting it he stated:

> The extension of time for filing the return does not operate to extend the time for payment of the tax. It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

In response thereto the plaintiffs on December 24, 1934, forwarded the Collector a check for $120,000 "as a payment on account of the Federal Estate tax." On February 25, 1935, plaintiffs filed a return showing a tax of $80,224.24. The Collector applied so much of the $120,000 toward the payment of the tax shown on the return, and retained the balance in the suspense account in which the remittance had been originally deposited, pending an audit of the return. After an audit, the Commisisoner, in April 1938, assessed [fol. 20] an additional tax of $48,534.84. The balance remaining in the suspense account, $39,775.76, was applied toward the satisfaction of this deficiency, and demand was made on the plaintiffs for the payment of the balance, together with interest. The plaintiffs paid this amount, $10,497.34, on April 22, 1938.

When plaintiffs filed the return showing the tax due of $80,224.24, they did not immediately demand refund of the

balance they had remitted on account of the tax, to wit, $39,775.76; but, no audit of its return having been made by March 26, 1938, plaintiffs on that date did file a claim for refund of the balance. This was about three years and three months after the remittance. Then, after payment of the additional tax assessed, plaintiffs filed another claim for refund on May 20, 1940, on the ground that the Commissioner had not allowed deductions of $91,685.45 for executors' commissions, $31,000 for attorneys' fees, $25,483.69 for miscellaneous administration expenses, and $25,000 which was paid in settlement of Martin Rosenman's claim.

Plaintiffs' right to recover depends on whether or not these two claims were filed within the statutory period of three years.[1]

Plaintiffs say that the remittance of $120,000 was merely a deposit and was not a payment of tax, and that the date the statute began to run was the date the deposit was applied in settlement of the tax found to be due. This position is untenable. The $120,000 was paid in response to the above-quoted statement in the Commissioner's letter granting the extension of time for filing the return, in which he stated that the extension of time for filing the return did not extend the time for payment of the tax, and in which he suggested that the tax be estimated and paid to avoid delinquency in payment and the consequent liability for penalty and interest. In the letter transmitting the $120,000 the executors said that it was being transmitted "as a payment on account of the Federal Estate tax."

If it had not been a payment, but was merely a deposit, it would not have prevented the accrual of the penalty for non-payment when due, nor stopped the running of interest. It was a payment of the amount of tax estimated to be due. [fol. 21] The fact that the Collector put the money in a suspense account to the credit of the executors seems to us immaterial. At the time the Collector received the money there was no charge on his books against plaintiffs against which the remittance might be credited; hence, he merely put it in a suspense account until the amount of plaintiffs' liability could be determined.

The $120,000 was a payment of estate tax, and the statute, therefore, began to run on the day it was paid. *Atlantic Oil*

[1] Sec. 810 of the Revenue Act of 1932, 47 Stat. 169.

Producing Co. v. *United States*, 92 C. Cls. 441, 35 F. Supp. 766.

The first claim for refund was not filed until more than three years thereafter. Plaintiffs, therefore, are barred from the recovery of any part of the $120,000.

The second claim for refund was filed within three years of the payment of the $10,497.34, and plaintiffs, therefore, are not barred from recovering such sum if it was in fact an overpayment.

This brings us to the question as to whether or not the plaintiffs are entitled to the deduction of the $25,000 paid in settlement of the claim of Martin Rosenman against the estate.

Martin Rosenman claimed that the decedent, his father, had given him $167,000 worth of securities during his lifetime, which the executors had taken and had treated as a part of the decedent's estate. These securities were found in two of decedent's lock boxes, to one of which Martin Rosenman had access. He claimed that the gift had been completed by delivery during decedent's lifetime and that the securities were in the possession of the decedent only for the purpose of administration for Martin Rosenman's benefit. On February 27, 1934, two months after his father's death, he made demand on the executors for the delivery of the securities to him, which he said "were held by the deceased for my account." Later, on July 23, 1934, he made demand upon them for the interest, dividends, and proceeds of sales of such securities as had been sold during the lifetime of Louis Rosenman. He said that the deceased had "collected these items and failed to turn them over," but he said that "these items may all be found in the check book of the deceased under my name and in his ledger as well."

[fol. 22] At first the executors rejected his claim, but as the result of further negotiations the parties came to an agreement on $25,000, to be paid in full satisfaction of Martin Rosenman's claims, subject to the approval of the Surrogate's Court. In the petition filed in the Surrogate's Court asking approval of the compromise, the executors said in part:

> The validity of the claim was apparently sustained to some extent by the fact that the decedent caused income tax returns to be prepared for the said claimant Martin Rosenman, reflecting in the same the income

from the said securities and the losses resulting from the sales of such of the securities as were sold during the taxable year which tax return entries could not be explained by a desire of the decedent to minimize income taxes, for the reason that the income returned was exceeded by the loss returned.

So, the executors were of the opinion that there was some evidence to show that the deceased had in fact made a gift during his lifetime to Martin Rosenman.

The Surrogate's Court appointed a special guardian to represent the interests of an infant beneficiary of the estate, and also a special guardian to represent another infant and the unborn and unknown beneficiaries of the estate. In the proceedings before a referee appointed to hear the matter, one of the guardians at first filed a report objecting to the compromise, but later withdrew his objection and agreed to it. The other guardian also agreed to the compromise. After a hearing the referee reported that the compromise was proper and should be approved, and the Surrogate's Court entered a decree accordingly.

The defendant says that Martin Rosenman's claim was based upon a mere promise to make a gift and, therefore, does not constitute a legal claim against the estate. This is manifestly incorrect. Martin Rosenman claimed that a gift had actually been made during the lifetime of the decedent. Upon no other basis could the Surrogate's Court have approved the compromise. If there had been nothing more than a promise to make a gift, Martin Rosenman would not have had any claim against the estate that would have justified the payment of anything. The decree approving the compromise was necessarily based upon the theory that there was some evidence to show that a completed gift had actually been made during decedent's lifetime.

[fols. 23-24] The defendant also says that the claim cannot be allowed because of the provision of the statute that deductions for claims against the estate were limited to such claims as "were contracted bona fide and for an adequate and full consideration in money or money's worth." It says a promise to make a gift is not supported by such consideration, but this argument fails for the same reason stated.

Martin Rosenman claimed, not under a promise, but as the result of a completed transaction. The statute refers to executory contracts, not to executed ones. Martin Rosen-

man's claim was that $167,000 worth of the securities, treated by the executors as a part of the assets of the estate, were not a part of its assets at all, but were his assets, because they had been given to him by the decedent during his lifetime. The judgment of the Surrogate's Court approving the settlement of $25,000 had the effect of excluding from the gross assets of the estate so much of the securities which the executors had been administering.

In neither *Glascock* v. *Commissioner*, 104 F. (2d) 475, nor *United States* v. *Mitchell*, 74 F. (2d) 571, nor *Latty* v. *Commissioner*, 62 F. (2d) 952, relied on by defendant, was it claimed that there had been a fully consummated gift during the lifetime of the decedent.

The plaintiffs are entitled to recover, but the entry of judgment will be suspended until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report from a commissioner, showing the amount due, computed in accordance with this opinion. It is so ordered.

Madden, *Judge;* and Littleton, *Judge*, concur.

Jones, *Judge;* and Whaley, *Chief Justice*, took no part in the decision of this case.

[fols. 25-26] Order of Court Entering Judgment—April 13, 1944

Order. This case comes before the court on plaintiffs' motion for the entry of judgment; and it appearing that on February 7, 1944, the court filed special findings of fact with an opinion holding that plaintiffs are entitled to recover, but suspended the entry of judgment to await the filing of a stipulation showing the amount due plaintiff, computed in accordance with the court's decision; and it appearing that on March 13, 1944, a stipulation was filed, signed on behalf of the plaintiffs by Mitchell, Taylor, Capron and Marsh and on behalf of the defendant by Assistant Attorney General Samuel O. Clark, Jr., in which it is stated that the amount "computed to be due the plaintiffs from defendant in accordance with the opinion of the Court rendered on February 7, 1944, in the above entitled proceeding is $10,497.34 together with interest thereon as provided by law from April 22, 1938",—now, therefore,

[fols. 27-28] It Is Ordered this 3rd day of April, 1944, that plantiffs' motion for the entry of judgment be and the same is allowed, and judgment is entered in favor of plaintiffs in said sum of ten thousand, four hundred ninety-seven dollars and thirty-four cents ($10,497.34) together with interest thereon as provided by law from April 22, 1938.

[fol. 29] Clerk's Certificate to foreging transcript omitted in printing.

Endorsed on cover: File No. 48,660. Court of Claims. Term No. 207. Lena Rosenman and The National City Bank of New York, a Corporation, as Executors of the Last Will and Testament of Louis Rosenman, Deceased, Petitioners, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 29, 1944. Term No. 207, O. T. 1944.

[fol. 30] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

CHARLES ANGULO,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

Petitioners above named pray that a writ of certiorari issue to review the judgment [R. 18-19] of the Court of Claims of the United States entered in this cause on April 3, 1944.

Statement of Matter Involved and Question Presented.

This is an action against the United States to recover an overpayment of Federal estate tax in the amount of $23,122.58. The Court of Claims held that *on the merits* plaintiffs would be entitled to recover the entire amount, but it

limited plaintiffs' recovery to $10,497.34 on the ground that as to the balance of $12,625.24 the plaintiffs' claim for refund was not timely filed with the Collector of Internal Revenue [R. 13-18]. Whether or not such refund claim was timely filed depends on the following question on which there is a conflict of decisions, namely: what is the legal status and effect of a remittance by a taxpayer to the Collector of Internal Revenue, *in advance* of his filing a tax return of any kind; or *in excess* of the tax shown in his return?

There appears to be no express authority conferred by the statute on Collectors of Internal Revenue to accept such remittances. However, it has long been the administrative practice for Collectors to accept them *not* as constituting the present "payment" of the tax but as being in the nature of a "deposit" to secure the payment of such tax as may be shown to be due in the tax return when filed, or as may be determined to be due by the Commissioner on the audit of the return. Accordingly, the administrative practice is to place such remittances to the *credit* of the taxpayer in a suspense account, one of which is known as Collector's Account #9, pending the filing or the audit of the tax return, as the case may be. When such return is filed or such audit completed, the amount standing to the credit of the taxpayer in Account #9 or other similar account is then applied by the Collector in payment of the tax shown in the return or in payment of the tax deficiency determined by the Commissioner, as the case may be, and an appropriate receipt is issued to the taxpayer showing such payment.

As long ago as April 14, 1933, the Comptroller General of the United States made a ruling in which he dealt with the nature of such a remittance and Collector's Account #9 (Vol. I, Prentice-Hall Tax Service, 1935, Special Re-

ports, par. 45). The case considered by the Comptroller General was quite similar to the present. The executors of an estate had secured an extension of time within which to file the Federal estate tax return, but prior to the expiration of such extension and before the filing of the return, they had remitted to the Collector of Internal Revenue the sum of $10,000 with which to pay such Federal estate tax as might be found to be due from the estate. The Comptroller General ruled that the remittance was a "deposit of $10,000 made in the nature of a cash bond to pay such taxes as might become due," and (referring to Collector's Account #9) he added that it "appears to have been so treated by the Collector of Internal Revenue who carried it in his accounts, not as a collection of taxes, but as a deposit for the payment of such taxes as might thereafter be found to be due."

Prior to the present case the Government's position before the courts has been the same as that of the Comptroller General in his said ruling. The Government's position was sustained by the Circuit Court of Appeals for the Third Circuit in the case of *Busser* v. *United States*, 130 F. (2d) 537 (1942), and by the District Court for the Southern District of New York in *Moses* v. *United States*, 28 F. Supp. 817 (1939). On the other hand, in *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766 (1940), the Court of Claims rejected the Government's contention and held that the payment of the tax (and hence the "overpayment") takes place when such a remittance is originally made, notwithstanding that at that time neither the taxpayer nor the Government has as yet taken the requisite action to determine what amount, if any, is *claimed* to be due. These two lines of decisions expressly recognize that they are in conflict with each other.

Although in the above cited cases the question of whether such a remittance is a present "payment" of the tax or a "deposit" for its future payment, arose in a somewhat different form, namely, as to the Government's liability for interest on the refund thereof, the basic question was essentially the same as that here involved. The determinative event which sets the time running is the same, namely, the *payment* of the tax. Under Section 3771(a) of the Internal Revenue Code interest must be allowed on a tax refund from the date of the overpayment of the tax; under Section 910 of the same statute claims for refund must be filed within three years from such payment. The Court below treated its prior decision in the *Atlantic Oil Producing Co.** case, *supra*, as controlling in the present case [R. 15-16].

The facts in the present case are not in dispute. Practically all of them were formally stipulated, and as so stipulated were adopted by the Court below as its Special Findings of Fact [R. 6]. So far as material to the above question, such facts are as follows:

On December 24, 1934, the plaintiffs (having previously obtained an extension of time to February 25, 1935, in which to file the Federal estate tax return) remitted to the Collector of Internal Revenue the sum of $120,000. The covering letter to the Collector enclosing this remittance stated that it was "a payment on account of the Federal Estate tax" [R. 7, F. 3]. However, it also added that " * * * *it is contended by the executors that not all of this sum is legally or lawfully due*" 6 [R. 7, F. 3].

The Collector placed the remittance in Collector's Account #9 to the credit of the estate [R. 8, F. 5]. On February 25, 1935, the plaintiffs filed the Estate Tax return

* Italics supplied throughout unless otherwise expressly stated.

showing an estate tax due of $80,224.24 [R. 8, F. 5]. Such tax was then assessed and the assessment paid by the Collector crediting against the same $80,224.24 from the $120,000 which stood to the credit of the estate in Account #9 [R. 8, F. 5]. Thereupon the Collector issued to the plaintiffs a formal receipt showing said payment and that there remained a balance of $39,775.76 in said account to the credit of the estate [R. 8, F. 6]. This balance was so retained by the Collector with the plaintiffs' acquiescence, pending the audit of the Federal estate tax return by the Government [R. 8, F. 5].

The Government took almost three years to audit the return. Upon such audit the Commissioner determined that there was an additional tax due of $48,534.84 over and above the amount shown in the return [R. 8, F. 8]. In due course this additional tax was assessed and thereupon the Collector applied in part payment thereof the said $39,775.76 which then stood to the credit of the estate in Account #9. This occurred in April, 1938 [R. 9, F. 9]. The plaintiffs' claim for refund was filed on May 20, 1940, and thus concededly within three years from the date on which said sum of $39,775.76 was so applied [R. 9, F. 11]. The balance of said tax deficiency amounting with interest to $10,497.34 was paid by the plaintiffs on April 22, 1938 [R. 9, F. 9]. The judgment below allows the recovery of this last mentioned sum so that no question arises in respect thereof [R. 18].

The applicable statute (Section 319(b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932) which is quoted in full in the annexed brief, provides that claims for refund of taxes shall be filed "within three years next after the payment of such tax." The court below held that even as to the said balance of $39,775.76 which stood to the credit of the estate in Collector's Account #9 as late as April, 1938, the "payment" of the tax occurred at the time

of the original remittance of $120,000 on December 24, 1934.

The Court held that the *whole* original remittance of $120,000 "was a payment of the amount of tax estimated to be due" [R. 15]. The Court based this conclusion on the statement in the letter of transmittal that the $120,000 was "a payment on account of the Federal Estate tax"; but the Court entirely disregarded the specific statement in said letter that "• • • it is contended by the executors that *not* all of this sum is legally or lawfully due" [R. 7, F. 3, last sentence].

It is apparent that the plaintiffs in their said letter did *not* purport to estimate the amount of the estate tax that was due. They expressly stated that the amount of the remittance was *in excess* of their estimate of the tax. Such estimate was furnished when the plaintiffs shortly thereafter filed with the Collector the estate tax return showing their computation of the estate tax to be $80,224.24. The tax return also served to supplement their letter in fixing the amount by which the remittance *exceeded* their estimate of the tax due. Thus, when the letter and the return are read together, their combined result was to inform the Collector that of the $120,000 remitted, $80,224.24 was in payment of plaintiffs' estimate of the tax and that the balance of $39,775.76 was *in excess* of such estimate and thus for deposit to their credit in Account #9 pursuant to the administrative practice we have explained. And this is precisely how the Collector actually treated the said remittance [R. 7-8].

Specification of Errors.

The Court of Claims erred:

I. In holding that except in respect of the $10,497.34 for which judgment was entered below, the plaintiffs' claim for refund was not filed within the three-year period prescribed by Section 319(b) of the Revenue Act of 1926, as

amended by the Revenue Act of 1932, and in limiting plaintiffs' recovery herein to said $10,497.34.

II. In holding that as regards the balance of $39,775.76 which remained to the credit of the estate in Collector's Account #9, pending the audit of the tax return, the payment of the tax within the meaning of said Section 319(b) took place at the time of the original remittance in December, 1934, and not in April, 1938, when said balance was applied by the Collector in partial payment of the additional tax which was then assessed.

III. In holding that the whole original remittance of $120,000 was transmitted by the plaintiffs to the Collector on December 24, 1934, as a payment of the amount of estate tax estimated by them to be due, and that the whole of such remittance when made was a payment of the tax within the meaning of said Section 319(b).

IV. In failing to hold that the said balance of $39,775.76 was retained by the Collector, with the plaintiffs' consent, as a deposit to secure the payment of any additional tax that might subsequently be found to be due upon the audit of the tax return.

Reasons for Granting the Writ.

I. There is a conflict of decisions. In *Busser* v. *United States*, 130 F. (2d) 537 (1942), decided by the Circuit Court of Appeals for the Third Circuit, the taxpayer prior to filing the Federal estate tax return sent to the Collector of Internal Revenue a check for $6,800, and in his letter of transmittal requested that the Collector "apply this on account of the tax in the above estate ultimately shown to be due by the Estate Tax Return when filed." The remittance was placed in Account #9 to the credit of the taxpayer. When the estate tax return was subsequently

filed showing a tax liability of $5,000.49, the Collector paid this amount from Account #9, leaving a balance of $1,799.51 in said account to the credit of the taxpayer. The question presented was whether the taxpayer was entitled to interest on the refund of this balance under Section 614 of the Revenue Act of 1928, which provides that "interest shall be * * * paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum." The Court of Appeals held that the said balance in Account #9 was not a tax payment and, accordingly, that no interest was allowable on the refund thereof. The Court of Appeals expressly recognized (p. 539, footnote) that its decision was in conflict with that of the Court of Claims in *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766 (1940), on the authority of which the Court below based its decision in the present case.

The Government's position in the *Busser* case was similar to our contention in the case at bar. It stated in its brief (pp. 11-13):

> "On September 1, 1938, when the check was delivered [by the taxpayer], the tax was not yet due and payable, nor was the estate tax return yet due. When the check was received, the Collector, accordingly, was not yet a creditor, and, more important, he had no way of determining what the amount of the debt was or, indeed, whether there was in fact any debt due. Nor did either of the parties treat the transaction as a payment. Rather the trustee [i.e., the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax * * * ultimately shown to be due by the Estate Tax Return when filed,' and, in turn, the Collector did not give a receipt on the usual form used for tax payment. Instead, the Collector acknowledged receipt of Price's [the taxpayer's] letter and promised a receipt upon the filing of the return, and, significantly, he treated the check not as a normal tax payment but credited it to Unidentified Account

(Account 9). *It is, therefore, abundantly clear, from the parties' own treatment of the transaction that the mutual intention requisite to constitute payment was absent here.*

* * * * * * *

"* * * Rather, the transaction was in the nature of a cash bond to secure or protect the liability of decedent's estate and to forestall the running of interest against it. * * *"

In *Moses* v. *United States*, 28 F. Supp. 817 (1939), decided by the District Court for the Southern District of New York, the taxpayer before filing the estate tax return for the estate sent to the Collector of Internal Revenue a check for $20,000, stating in his letter of transmittal that it was "to apply on account of the Federal Estate Tax liability of the decedent." The remittance was placed to the credit of the taxpayer in Account #9. Thereafter the tax return was filed showing a tax liability of $9,612, and later an additional tax was determined to be due of $2,447.98. These two amounts were paid by the Collector out of the said $20,000 in Account #9, leaving a balance in said account to the credit of the taxpayer of $7,940.02 which in due course was refunded to the taxpayer without interest. The question presented was as to the Government's liability for interest on such refund. In holding that no interest was allowable the Court said at p. 819:

"The excess contained in this taxpayer's deposit was, in no sense, either payment or overpayment but a deposit made to suit his own convenience."

The *Moses* case was cited with approval by the Circuit Court of Appeals for the Third Circuit in *Busser* v. *United States*, *supra*, (p. 539, n. 9); on the other hand, it was expressly disapproved by the Court of Claims in *Atlantic Oil Producing Co.* v. *United States*, *supra*, (p. 768) on the

authority of which the Court below based its decision in the present case [R. 15-16].

II. The question here involved is important in the administration of the Internal Revenue laws and has not been, but should be, decided by this Court. From the standpoint of the Government, there is an obvious advantage in having taxpayers make deposits with it, in order to secure the future payment of any additional tax that may be found to be due on the audit of their returns. The decision below would tend to discourage taxpayers from making such deposits. For it casts upon such taxpayers the burden and consequent risk of keeping track of the time consumed by the Government in auditing their returns. It would, therefore, seem to be highly desirable in the administration of the Internal Revenue laws that the true status of such remittances be clarified and definitely determined by this Court.

Furthermore, as indicated above, the Government in every case prior to the present one, has taken the position that such remittances are deposits in the nature of a cash bond and do not actually become tax payments until subsequently applied in payment of the tax shown in the tax return or in payment of a tax deficiency determined by the Commissioner. The Government in the present case has taken a position diametrically opposed to that which it has urged upon the courts in the past. It is respectfully submitted that it is not in the public interest that the Government be in a position to argue inconsistently in respect of the self same type of remittance that in one case it is a tax payment and in another, a "deposit," depending on which of these alternatives happens to be most unfavorable to the individual taxpayer. Whatever the correct view may be as to the true status of such remittances, it should apply

to all taxpayers alike and in all courts. This requires that the question involved be settled and finally determined by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

CHARLES ANGULO,
Counsel for Petitioners.

June, 1944.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Claims is reported in 53 F. Supp. 722.

Jurisdiction.

The judgment of the Court of Claims was entered on April 3, 1944 [R. 19]. The jurisdiction of this Court rests on Section 3 of the Act of February 13, 1925 (c. 229, 43 Stat. 939).

Statement.

A statement of the facts and of the questions involved and of the assignment of errors will be found in the petition.

Statute Involved.

Section 319(b) of the Revenue Act of 1926, as amended by Section 810 of the Revenue Act of 1932 (47 Stat. 169), which as so amended provides as follows:

> "All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

ARGUMENT.

The above quoted statute does not bar the plaintiffs from recovering the full amount of $23,122.58 herein claimed.

It seems to us apparent that in enacting the above statute Congress did not intend to preclude a taxpayer in a situation like that in the present case, from recovering money

due to him from the Government. The reason for the statute is plain. Without some such statute the Government could never know what portion of the taxes collected, definitely belonged to it. Thus, the orderly administration of the public finances would be impossible. The reason and purposes of the statute are wholly inapplicable to a situation like the one in the present case. Here the balance of $39,775.76 which remained in Account #9 pending the audit of the return, was being held by the Government during that period, *not* as moneys which belonged to it or to which it claimed to be entitled, but, on the contrary, as moneys which belonged to the plaintiffs and which the Government was holding with their consent, for their account and to their credit. Not until April, 1938, when it was applied in partial payment of the tax deficiency which was then assessed, was the said balance carried in the Government's accounts as a tax collection.

So long as said balance remained in Account #9 to the credit of the plaintiffs, there was no need or occasion for them to notify the Government of their claim of ownership. Such ownership was not disputed; it was acknowledged by the Government and shown on its own records. It seems incredible that under such circumstances Congress would have wished to penalize a taxpayer for his commendable conduct in cooperating with the Government by allowing it to retain his money as security for the payment of any additional tax that might be found to be due from him upon the audit of his return.

Moreover a "payment" can only result from the mutual agreement of the parties. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. During the period that the said balance of $39,775.76 stood to the credit of the plaintiffs in Account #9 and until the final audit of the tax return, neither party, that is to say, neither the Government nor the plain-

tiffs, claimed that there was any additional tax due or owing by the latter. The plaintiffs had filed their tax return fixing the amount of the tax claimed by them to be due at $80,224.24, which sum had been duly paid. Therefore, so far as they were concerned, their tax liability had been fixed and satisfied. On the other hand, although the Government was still engaged in auditing the return, it had not yet challenged or questioned plaintiffs' determination of their own liability. As the matter then stood, therefore, neither party was claiming that any additional sum was due. Therefore, it is difficult to see how the said balance of $39,775.76 while in Account #9 could be regarded as a "payment" of something which neither party then considered to be due.

Respectfully submitted,

CHARLES ANGULO,
Counsel for Petitioners.

June, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

There Is a Conflict of Decisions.

Although the Government concedes that *Atlantic Oil Producing Company* v. *United States*, 35 F. Supp. 766 and *Busser* v. *United States*, 130 F. (2d) 537 are in conflict, its principal contention in opposing petitioners' appli-

cation for certiorari is that the question involved in those cases "is a question distinct from that in the present case" (Res. Br. p. 10). ***But in the court below the Government successfully argued the contrary.*** It there asserted that the *Atlantic Oil Producing Co.* case was a controlling authority against us. At page 58 of the Government's brief in the court below, it said:

> "However, the question is no longer open in this court. In *Atlantic Oil Producing Company* v. *United States*, 92 C. Cls. 441, 35 F. Supp. 766, this Court held directly that an advance overpayment of capital stock tax was a payment of tax and that interest was payable by the Government on the refund. The court specifically refused to follow the rule of the *Moses* case, *supra*."

The *Moses* case (*Moses* v. *U. S.*, 28 F. Supp. 817) was specifically followed and approved by the Circuit Court of Appeals in the *Busser* case.

In accordance with the Government's contention the court below based its decision in the present case on its prior decision in the *Atlantic Oil Producing* case (R. 15 last par.).

The Amount in Account 9 Was Held to the Credit of the Estate and Not to the Credit of the United States Treasurer.

The statement on page 2 of the Government's brief that the remittance of $120,000 "was deposited as an internal revenue collection in a so-called suspense account to the credit of the Treasurer of the United States" may prove

misleading. The remittance in question was carried on the books of the Collector in suspense Account 9 *to the credit of the estate* until applied in satisfaction of assessments thereafter made. (R. 8, F. 5, first and last sentences; R. 9, F. 9, first sentence.) The Government at page 9 of its brief attempts to attach significance to the fact that the Collector deposited the cash representing the proceeds of the remittance to the credit of the Treasurer of the United States. That fact, however, is of no importance, as was pointed out by the Government itself in its brief in the *Atlantic Oil Producing Co.* case where it said at page 26:

> "The Collector did the only thing he could to indicate that the deposit was not a normal tax payment when he credited it to Suspense Account 9. That action once and for all served to distinguish it from a tax payment. *What happened afterwards in the way of covering it into the Treasury, et cetera, is unimportant.*" (Italics supplied.)

Presumably, all cash received by a Collector of Internal Revenue in connection with taxes, irrespective of whether it is received as a "deposit" or cash bond or as an actual payment of an outstanding tax assessment, is deposited by the Collector in a bank or other legal depositary to the credit of the Treasurer of the United States. Manifestly, however, where the cash in question has been received by the Collector as a "deposit" or cash bond and thus placed to the credit of the taxpayer in Account 9, the cash account of the Treasurer of the United States must be correspondingly debited or else the books would not balance. No such debit would occur when the cash is received as a tax payment.

The Commissioner's Letter.

The statement from the Commissioner's letter, quoted by the Government on page 5 of its brief, must be read in the light of the administrative practice and the court decisions (*Busser* v. *U. S.*, 130 F. 2d 537; *Moses* v. *U. S.*, 28 F. Supp. 817) pursuant to which the making of a "deposit" is sufficient to avoid interest and penalties. That such is the effect of a deposit seems to be conceded by the Government on page 11 of its brief wherein it states:

> "Taxpayers will doubtless continue to make such deposits in order to avoid payment of interest and penalties on taxes due."

(See also Government's brief in *Busser* case quoted at page 9 of petition herein.)

Thus the Commissioner's suggestion, though inartificially worded, was that the executors should make the type of payment which would avoid interest and penalties or, in other words, a "deposit" to be placed in Account 9, and this is precisely how the remittance in question was handled by the Collector.

The foregoing also answers the argument of the Government on page 9 of its brief to the effect that the remittance in question must have been a tax payment and not a deposit because interest was not charged on that portion of the tax deficiency to the payment of which such remittance was eventually applied. This argument entirely disregards the administrative practice of the Treasury, the Government's position before the courts in prior cases and the above decisions of the courts pursuant to which a deposit has been uniformly regarded as avoiding interest and penalties on the tax thereafter assessed, presumably, because during the period of the deposit the Government

has the full use of the money without paying interest therefor.

Under the Government's Construction of Section 319 (b) the Filing of a Claim for Refund Might be Barred by the Statute of Limitations Before the Right to File the Claim Accrued.

Section 319 (b) of the Revenue Act of 1926 as amended (which is the statute here involved) deals with the filing of claims for refund in respect of taxes which are "alleged to have been *erroneously* or *illegally* assessed or collected" and requires that such claims for refund be filed "within three years next after the payment of *such* tax", i. e. the tax alleged to have been *erroneously* or *illegally* assessed or collected. (Italics supplied.) Thus the "payment" referred to in the statute is of a tax which has been, or is alleged to have been, *erroneously* or *illegally* assessed or collected.

Section 319 (b) therefore applies only to those claims for refund wherein an essential element of the taxpayer's right or supposed right of recovery is that the tax has been, or is alleged to have been, erroneously or illegally assessed or collected. Unless and until the Commissioner or the Collector has been guilty of some mistake or illegality, actual or alleged, in the assessment or collection of the tax, the taxpayer's right or supposed right of recovery to which Section 319 (b) refers, cannot arise; in other words the taxpayer's "cause of action" cannot accrue.

Section 319 (b) is a statute of limitations and in view of the nature and function of such a statute it seems entirely clear that said section must contemplate that the taxpayer's right or supposed right of refund with which it deals, shall have accrued to the taxpayer prior to the

period of limitation which it fixes; in other words that the taxpayer's "cause of action" shall have accrued prior to such period of limitation.

Now, when a taxpayer makes a remittance to the Collector of Internal Revenue in *advance* of his filing his tax return or in *excess* of the amount of tax shown in the return, there is no basis for the taxpayer's alleging, prior to the filing or the audit of such return, as the case may be, that the Commissioner or Collector has been guilty of a mistake or illegality in the assessment or collection of the tax. The Government seems to concede this on page 11 of its brief.

Such a remittance is made by the taxpayer voluntarily, for his own convenience and benefit, and pending the filing or the audit of his tax return, as the case may be, is being held by the Government with the taxpayer's consent, for the account and to the credit of the taxpayer. Up to that time therefore there would be no basis for the taxpayer to claim that the tax had been erroneously or illegally assessed or collected, because nothing has been done except to comply with his wishes in respect of the remittance.

The Government nevertheless contends that during this same period, the three year limitation provided for in Section 319 (b) is running against the taxpayer. Such a construction of Section 319 (b) would lead to an absurd result and would be contrary to our accepted notion of the nature and function of a statute of limitations, for it might bar the taxpayer's right of recovery *before* such right even came into existence; in other words, it would bar the cause of action before such cause of action even accrued.

Respectfully submitted,

CHARLES ANGULO,
Counsel for Petitioners.

September, 1944.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 207.

LENA ROSENMAN and THE NATIONAL CITY BANK OF NEW YORK, a Corporation, as Executors of the Last Will and Testament of Louis Rosenman, Deceased,

Petitioners,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONERS.

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OPINION BELOW.

The opinion of the Court of Claims [R. 13] is reported in 53 F. Supp. 722.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925 (c. 229, 43 Stat. 939) as amended in 1939 by c. 140, 53 Stat. 752. The judgment of the Court of Claims was entered on April 3, 1944. The petition for writ of certiorari was filed June 29, 1944, and was granted October 9, 1944 [R. 19].

Question Presented.

Whether the claim for the refund of that portion of the estate tax here in question, was timely filed in accordance with the provisions of the following statute.

Statute Involved.

Section 319(b) of the Revenue Act of 1926, as amended by Section 810 of the Revenue Act of 1932 (47 Stat. 169), which as so amended provides as follows:

> "All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

Statement.

This is an action against the United States to recover part of an additional Federal estate tax which the Commissioner assessed against the petitioners in April, 1938, on the ground that such assessment was erroneous and illegal, in that the Commissioner failed to allow certain proper deductions in computing the amount of the net taxable estate. The Court of Claims held that *on the merits*, the petitioners would be entitled to recover the entire amount

claimed, namely, $23,122.58, but it limited their recovery to $10,497.34 on the ground that as to the balance of $12,625.24, the petitioners' claim for refund was not timely filed in accordance with the provisions of the above quoted statute [R. 13-18].

The facts in the case are not in dispute. The decedent died on December 25, 1933. On December 24, 1934, the petitioners as executors of his estate, (having previously obtained an extension of time to February 25, 1935, in which to file the Federal estate tax return) remitted to the Collector of Internal Revenue the sum of $120,000. The covering letter to the Collector enclosing this remittance said that it was "a payment on account of the Federal Estate Tax"; but it also pointed out that the remittance was *in excess* of the tax due [R. 7, last paragraph of letter].

Pending the filing of the estate tax return, the Collector placed the whole remittance to the *credit of the estate* in a "suspense" account known as Collector's Account #9 [R. 8]. On February 25, 1935, the petitioners filed the estate tax return showing that the estate tax due was $80,224.24 [R. 8]. Such tax was then assessed and this assessment was paid by the Collector's crediting against it the sum of $80,224.24 from the $120,000 which then stood to the credit of the estate in Account #9 [R. 8]. Thereupon, the Collector issued to the petitioners a formal receipt showing the payment of such tax and also showing that there remained a balance of $39,775.76 in said Account #9 to the credit of the estate [R. 8]. This balance, with the petitioners' acquiescence, was so retained by the Collector to the credit of the estate pending the Government's audit of the tax return [R. 8].

The Government took almost three years to audit

the return. Upon such audit the Commissioner determined that there was an additional tax due of $48,534.84 over and above the amount shown in the tax return [R. 8]. In April, 1938, the Commissioner assessed this additional tax against the petitioners, and the Collector applied in part payment thereof the balance of $39,775.76 which then stood to their credit in Account =9 [R. 9]. The claim for refund was filed on May 20, 1940, which was less than three years thereafter [R. 9, F 11].[1]

We contend that the statutory period of limitation commenced to run in April, 1938, when the Commissioner erroneously and illegally assessed the additional tax and the Collector transferred the said credit balance from the petitioners' account to the Government's account, in partial payment thereof.

The Court below held that the period of limitation commenced to run at the time of the original remittance of $120,000 in December, 1934, and that, therefore, the claim for refund was not timely filed.

Specification of Errors.

The Court of Claims erred in holding that petitioners' claim for refund was not filed within the three year period prescribed, by Section 319(b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932, except as to the $10,497.34 for which judgment was entered below, and in limiting petitioners' recovery herein to said $10,497.34.

[1] The balance of the additional tax (after allowing for the said payment of $39,775.76) amounted, with interest, to $10,497.34, and concededly was paid by the petitioners on April 22, 1938 [R. 9]. The judgment below allows the recovery of this last mentioned sum so that no question arises with respect thereto [R. 8].

ARGUMENT.

I.

THE STATUTE WAS NOT INTENDED TO PRECLUDE RECOVERY IN A CASE LIKE THE PRESENT.

It seems to us apparent that in enacting the above statute Congress did not intend to preclude a taxpayer in a situation like that in the present case, from recovering money due to him from the Government. In *Kales* v. *United States*, CCA 3rd, 115 F. (2nd) 497, the Court said at page 500:

> "The prerequisite refunding statutes requiring claim for refund before suit, should receive a practical construction to effectuate their purpose."

The purpose of the statute is plain. Its function, like that of limitations generally, is to protect the Government against stale demands (*United States* v. *Memphis Oil Co.*, 288 U. S. 62, 71). Without some such statute the Government could never know what portion of taxes collected, definitely belonged to it, and thus the orderly administration of the public finances would be impossible.

The reason and purpose of the statute are wholly inapplicable to a situation like the one in the present case. Here the balance of $39,775.76 which remained in Account #9 pending the audit of the estate tax return, was being held by the Government during that period, *not* as moneys which belonged to it or to which it claimed to be entitled, but, on the contrary, as moneys which belonged to the petitioners and which the Government was holding with their con-

sent, for their account and to their credit [R. 8, F 5]. Not until April, 1938, when it was applied in partial payment of the additional tax which was then assessed, was the said balance carried in the Government's accounts as a tax collection [R. 9, F 9 and Point III, *infra*].

So long as the said balance remained in Account #9 to the credit of the petitioners there was no need or occasion for them to notify the Government of their claim of ownership. Such ownership was not disputed; it was acknowledged by the Government and shown in its own records [R. 8, F 5].

But furthermore, in April, 1938, prior to the assessment of the additional tax, there stood on the books of the Government a credit of $39,775.76 in favor of the petitioners. This credit the petitioners were then entitled to collect as an acknowledged indebtedness owing to them by the Government as shown by its own records and accounts. 28 USCA §250 (1); Judicial Code §145; *Ball* v. *United States*, 295 U. S. 247, at page 261; *United States* v. *State Bank*, 96 U. S. 30, at pages 35, 36. It was not then barred by limitation, for it was governed by the six-year statute (28 USCA §262; Judicial Code §156).

Therefore, in April, 1938, the Collector, in effect, seized this valid claim of the petitioners against the Government and applied it in partial payment of the additional tax which was then assessed.[2]

[2] According to the Government's contention, even if in April, 1938, the Commissioner on auditing the return had determined that it was correct as filed, the petitioners, nevertheless, would have been precluded by the statute here in question from recovering the balance of $39,775.76 which then stood to their credit in Account #9. This, we submit, is almost a *reductio ad absurdum*. For in the assumed case the additional tax would not have been assessed and hence the Collector would have had no authority to transfer said balance out of Account #9 in payment thereof.

II.

THE CAUSE OF ACTION ON WHICH PETITIONERS' CLAIM FOR REFUND WAS BASED, ACCRUED IN APRIL, 1938. HENCE THE STATUTORY PERIOD OF LIMITATION COMMENCED TO RUN AT THAT TIME.

The immediate source of Section 319(b) of the Revenue Act of 1926 (the statute here involved) was Section 3228 of the Revised Statutes. Section 3228 of the Revised Statutes, in turn, was derived from Section 44 of the Act of June 6, 1872 (17 Stat. 257), which apparently contained the first statutory limitation of time for presenting to the Commissioner of Internal Revenue claims for the refund of taxes (*Wright* v. *Blakeslee*, 101 U. S. 174, 179).

In fixing the time from which such period of limitation was to be measured, the 1872 Act used the phrase "within two years next after *the cause of action accrued*".* This same phrase was carried over into Section 3228 of the Revised Statutes of 1873-4 and remained in said section until 1921. The "cause of action" referred to was, of course, the cause of action on which the claim for refund was based.

By Section 1310 of the Revenue Act of 1921, the said period of limitation was enlarged from two to four years and in so amending Section 3228 of the Revised Statutes the present phrase "next after the payment of such tax" was substituted for the former phrase "next after the cause of action accrued". It is plain, however, that this change in phraseology was not intended to change the meaning or effect of Section 3228. At that time it was settled law that a tax could

* Italics ours throughout this brief.

not be recovered back, even though erroneous or illegal, unless it was paid under protest and duress. Necessarily, therefore, *such* payment fixed the time of accrual of the "cause of action" referred to in said section (*Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 204; *Public Service Corporation* v. *Herold*, 279 Fed. 352, 354).[3]

Hence, it seems apparent that in substituting the expression "next after the payment of such tax" for the older phrase theretofore used in Section 3228, namely, "next after the cause of action accrued", Congress did not intend to change the meaning or effect of said section, but was merely clarifying it (as it then seemed), by specifying the particular event which under the law as it then stood, fixed the *time of accrual* of the cause of action therein referred to.

As indicated above, the provisions of the statute here in question, namely, Section 319(b) of the Revenue Act of 1926, were derived directly from Section 3228 of the Revised Statutes, and it would seem entirely clear that the phrase "next after the payment of such tax" found in Section 319(b) was intended to have the same meaning and effect as the identical phrase in Section 3228 of the Revised Statutes.[4]

[3] It was not until 1924 that Congress for the first time enacted legislation which permitted a suit to be maintained for the recovery of a tax even though it had not been paid under protest and duress (Section 1014(a) of the Revenue Act of 1924 amending Section 3226 of the Revised Statutes dealing with suits for the recovery of taxes).

[4] By Section 1112 of the Revenue Act of 1926, Section 3228 of the Revised Statutes was amended so as to make it no longer applicable to the Federal estate tax, and Section 319(b), similar to Section 3228 but dealing exclusively with the Federal estate tax, was enacted. By said Section 319(b) the period of limitation was made three years instead of the four years prescribed by Section 3228 of the Revised Statutes.

In 1932 Congress added the last sentence of Section 319(b) as quoted above (p. 2) (Revenue Act of 1932, §810). The only purpose of the added sentence was to make it clear that the period of limitation with respect to any *portion* of the tax paid, began to run when the cause of action accrued as to such portion, and *not* when the cause of action accrued with respect to the *whole* amount of the tax that was recoverable (*cf. Hills* v. *United States*, 8 F. Supp. 849). Although the added sentence, in keeping with the phraseology theretofore used in the section and its predecessor section, speaks in terms of the payment of the tax, such terms were not intended to have a different meaning from similar terms in the same section,—which, as we have seen, refer to the accrual of the cause of action.

But, moreover, entirely aside from its historical background, the nature and function of the statute would, in themselves, lead to the same conclusion. For the statute in question is a statute of limitations. Its function, like that of limitations generally, is to protect against stale demands. (*United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71). In view of the nature and function of such a statute Congress could hardly have intended that the period of limitation should commence to run before the "cause of action" on which the claim for refund is predicated, accrued.

When, therefore, did such "cause of action" accrue, in the present case? The statute deals with claims for refund in respect of taxes which are "*alleged to have been erroneously or illegally assessed or collected*". This language presupposes that there has been some administrative action or determina-

tion which is alleged to be erroneous or illegal, in the assessment or collection of the tax. In other words, one of the necessary elements of the "cause of action" is the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax. Manifestly,[3] until the administrative officials have acted, the "cause of action" does not accrue.

At the time of the original remittance of $120,000 in December, 1934, neither the Commissioner nor the Collector took any action, or made or purported to make any determination, tentative or otherwise, in respect of the tax. They had no data before them on which to base any such determination or action. They were, therefore, holding any such determination or action *in abeyance* pending the filing of the return and, accordingly, the amount of the remittance was meanwhile being held in a "*suspense*" account to the credit of the estate [R. 7, 8, F 4, 5]. At that stage of the matter, there would be no basis for claiming that any action or determination of the administrative officials was erroneous or illegal. Nothing had been done by them except that the Collector had received the remittance from the petitioners in accordance with their request, and had placed it temporarily to their credit on his books pending the filing of the return.[3]

The Court below was of the opinion that the controlling question in the case was whether the original remittance of $120,000 was merely a "deposit" or an

[3] Surely the statute contemplated something more than this as a ground for charging the administrative officials of the Government with error or illegality in the discharge of their duties and subjecting them and the Government to suit. In reality, the administrative officials were withholding action in respect of the tax until the tax return had been filed.

advance payment of the tax [R. 15].[6] In this, we think the Court was in error. Whether the original remittance was a "deposit" or an advance payment of the tax, it, nevertheless, was not *the* "payment" contemplated by the statute. *It was not the payment of a tax in respect of which the Commissioner or Collector had made any determination or taken any action that was erroneous or illegal.* In other words, it was not a payment upon the making of which the "cause of action" contemplated by the statute, accrued.

The Court below said that if the original remittance had not been a payment of the tax, it could not have prevented the accrual of penalties and interest [R. 15]. It is respectfully submitted that this reasoning is fallacious. It overlooks that the phrase "next after the payment of such tax" contained in the statute, has the same meaning as its predecessor phrase "next after the cause of action accrued". Thus, there may be a "payment" which avoids interest and penalties but which, nevertheless, does not result in the accrual of the "cause of action" contemplated by the statute, because no administrative determination or action in respect of the tax has as yet been made or taken.

We respectfully submit, therefore, that the "cause of action" in question did not accrue at the time of the original remittance. When the tax return was filed in February, 1935, it showed a tax liability of $80,224.24. Thereupon the Commissioner assessed an estate tax against the petitioners in that amount and

[6] As shown in Point III of this brief, the administrative practice of the Government is to treat a remittance like the one here involved as being merely a "deposit", as distinguished from a tax payment, pending the filing of the tax return and the assessment of the tax thereby shown to be due.

the Collector paid such assessment by transferring the sum of $80,224.24 to the Government's account from the $120,000 then standing to the petitioners' credit on his books [R. 8]. This action of the Commissioner and the Collector was obviously neither erroneous nor illegal since the tax assessed and collected concededly was due.[7]

The petitioners' claim for refund here in question was based upon the erroneous and illegal action of the Commissioner in assessing the *additional* tax and of the Collector in transferring the said credit balance to the Government's account in payment thereof. This occurred in April, 1938, and hence the "cause of action" accrued at that time. The claim for refund was filed within three years thereafter, on May 20, 1940.

III.

THE GOVERNMENT'S ADMINISTRATIVE PRACTICE IS TO TREAT A REMITTANCE BY A TAXPAYER IN ADVANCE OF HIS FILING A TAX RETURN, AS MERELY A DEPOSIT.

Pending the filing of the tax return such a remittance is not carried in the Collector's accounts as a

[7] Neither were the administrative officials guilty at that time of any error or illegality in dealing with the balance which remained in Account #9 to the credit of the estate. They made no claim to this balance either as a tax collected or otherwise and they would have paid it over to the petitioners on request. On the other hand, the petitioners' claim against the Government in respect of said balance would be based upon its implied promise to pay the indebtedness owing to the petitioners according to the Government's own accounts (*Bull* v. *United States* and *United States* v. *State Bank*, both *supra*), which claim would be governed by the six-year statute (Judicial Code §156; 28 USCA §262). This valid claim was seized by the Collector in April, 1938, in payment of the additional tax.

tax collection, but is held to the *credit of the taxpayer* in a special account known as Account =9 [R. 7, F 4].

As long ago as April 14, 1933, the Comptroller General of the United States made a ruling that such a remittance, while in Account =9, was a "deposit" and not a tax payment (Vol. 1, Prentice-Hall Tax Service, 1935, Special Reports, par. 45). The case considered by the Comptroller General was similar to ours. The executors of an estate had obtained an extension of time in which to file the Federal estate tax return, and before filing the return they had remitted to the Collector of Internal Revenue the sum of $10,000 with which to pay such Federal estate tax as might be found to be due from the estate. The Comptroller General ruled that the remittance was a "*deposit* of $10,000 made in the nature of a cash bond to pay such taxes as might become due", and (referring to Collector's Account =9) he added that it "appears to have been so treated by the Collector of Internal Revenue who carried it in his accounts, not as a collection of taxes, but as a *deposit* for the payment of such taxes as might thereafter be found to be due".

In *Moses* v. *United States*, 28 F. Supp. 817 (1939), which involved a similar remittance, the Government stated in its brief:

> "The record shows that the $20,000 was covered into 'Account 9, unidentified' and that after the assessments, the correct amounts were transferred from Account 9 into the regular accounts in payment of the assessments. Throughout the Collector treated the payment of $20,000 as a *deposit* to be applied to the payment of taxes when they should be assessed." (Government's Supp. Br. p. 9.)

Dealing with a similar remittance in *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 765 (1940), the Government said in its brief at p. 26:

> "They [the Commissioner of Internal Revenue and the Collector] both used the regular form and procedure, notwithstanding the fact that the deposit by plaintiff was *sui generis* so far as normal tax-collection practice is concerned. The Collector did the only thing he could to indicate that the deposit was not a normal tax payment when he credited it to Suspense Account 9. *That action once and for all served to distinguish it from a tax payment.* What happened afterwards in the way of covering it into the Treasury, *et cetera*, is unimportant."

And again in *Busser v. United States*, 130 F. (2d) 537 (CCA 3d, 1942), where the procedure followed by the taxpayer and the Collector was also substantially the same as in the present case, the Government's brief stated:

> "* * * Nor did either of the parties treat the transaction as a payment. Rather the trustee [i. e., the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax * * * ultimately shown to be due by the Estate Tax Return when filed,' and, in turn, the Collector did not give a receipt on the usual form used for tax payment. Instead, the Collector acknowledged receipt of Price's [the taxpayer's] letter and promised a receipt upon the filing of the return, and, significantly, he treated the check not as a normal tax payment but credited it to Unidentified Account (Account 9). *It is, therefore abundantly clear, from the parties' own treatment of the transaction that the*

mutual intention requisite to constitute payment was absent here.

* * * *

"* * * Rather, the transaction was in the nature of a cash bond to secure or protect the liability of decedent's estate and to forestall the running of interest against it." (Government's Br. pp. 11-13.)

In all three of the above cases, the specific question involved was as to the Government's liability for interest on that part of the deposit which had become refundable to the taxpayer, after his return was filed and his tax liability discharged. In the *Moses* and *Busser* cases, *supra*, the Court upheld the Government's contention that no interest was payable; on the other hand, in the *Atlantic Oil Producing Co.* case, *supra*, the Court of Claims reached a contrary conclusion; but in none of the cases did the Court question the accuracy of the Government's statements concerning the administrative practice of treating such a remittance as being merely a "deposit" pending the filing of the tax return.

Furthermore, it is the practice of the Government, not to claim interest or penalties on so much of the tax as is covered by such a deposit. This encourages taxpayers to make such deposits and accomplishes a just result. For during the period of the deposit the Government has the full use of the money and, of course, it does not pay interest on that portion of the deposit which subsequently is applied in payment of the tax. Thus, for practical purposes, the Government is in the same position as if the tax had been fixed and paid at the time of the deposit. This administrative practice appears never to have been

questioned. The question that has arisen is as to the Government's liability for interest on the surplus of the deposit which eventually becomes refundable to the taxpayer. That was the question litigated in the above three cases. But, although the Government contended in those cases that the remittance was a deposit, it did not question that the effect of such a deposit was to forestall interest and penalties.

The suggestion of the Commissioner, in his letter to the petitioners dated December 15, 1934 [R. 6, 7], that they make a payment on account of the tax in order to avoid interest and penalties, should be read in the light of the above administrative practice. When so read, his suggestion, though inartificially worded, in effect, was that the petitioners should make the *type* of payment which would avoid interest and penalties, that is to say, a deposit.

IV.

THE PETITIONERS POINTED OUT IN THEIR LETTER TO THE COLLECTOR THAT THE $120,000 WAS IN EXCESS OF THE AMOUNT DUE.

In the course of its opinion the Court below said that the *whole* original remittance of $120,000 "was a payment of the amount of tax estimated to be due" [R. 15]. This, we respectfully submit, is incorrect. The petitioners' letter transmitting the $120,000, in effect pointed out that it was *in excess* of the tax which they considered to be due. Although it is true that the letter stated that the $120,000 was being delivered as a "payment on account of the Federal estate tax," the letter also added that "* * * *it is contended*

by the executors that not all of this sum is legally or lawfully due" [R. 7, last paragraph of letter].

It is apparent, therefore, that the petitioners in their said letter did *not* purport to estimate the amount of tax that was due. Such estimate was furnished for the first time when shortly thereafter they filed with the Collector the estate tax return showing the tax liability to be $80,224.24 [R. 8, F 5]. Thus, when the letter and the return are read together, their combined result was to inform the Collector that of the $120,000 originally remitted, only $80,224.24 was in payment of petitioners' estimate of the tax due, and that the excess of $39,775.76 was to be held for their account and to their credit under the administrative procedure hereinbefore referred to. *And this is exactly how the Collector actually treated the remittance* [R. 8, F 5, 6].

CONCLUSION.

THE JUDGMENT BELOW SHOULD BE MODIFIED BY INCREASING THE AMOUNT TO $23,122.58.

Respectfully submitted,

CHARLES ANGELO,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1944.

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PETITIONERS' REPLY BRIEF.

I.

CONCERNING SUBDIVISION I OF GOVERNMENT'S BRIEF, pages 13-24.

None of the cases cited by the Government holds or remotely suggests that where a remittance is made to the Collector *in advance of the filing* of an estate tax return, the period of limitation for the filing of a claim for refund under the statute here involved or any comparable statute, runs from the time of such remittance notwithstanding that, pending the filing of the tax return, the tax officials are abstaining from taking any action in respect of the tax and are hold-

ing the remittance in a suspense account to the credit of the taxpayer. The core of the Government's argument is contained in the following statement on page 20 of its brief:

> "Any overpayment, whether made voluntarily by the taxpayer *on the original return* or as a result of an additional assessment made by the Commissioner, is a tax 'erroneously or illegally assessed or collected' and it may be recovered if a claim is filed within the prescribed time after the tax is paid and the amount allowed does not exceed the portion of the tax paid within such period." (Italics ours.)

The above quoted statement does not meet the issue in this case. It makes no reference to a remittance *in advance* of the filing of the tax return.

First, we may eliminate all of the cases and the Commissioner's ruling, cited by the Government, relating to *income* taxes (Br. 17, 19, 20, 23, 24) because the corresponding provisions of the income tax statutes *differ* materially from the provisions of the statute here involved. In 1924 Congress removed income, war-profits and excess-profits taxes from the scope of Section 3228 of the Revised Statutes and enacted separate and different provisions relating to those taxes (§1012 of the Revenue Act of 1924 amending §3228 of the Revised Statutes so as to exclude therefrom taxes covered by §281 of the same Act; §281 of the Revenue Act in 1924 dealing with overpayments of income, war-profits and excess-profits taxes). In so far as material, said Section 281 reads as follows:

> "Sec. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-

profits tax imposed [by specific Acts], the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance from such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions [specifying them but not material here] of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund."[1]

It will be noted that the above quoted statutory provisions deal with *any* overpayment of income, war-profits or excess-profits tax; whereas, the statute here involved (Section 319(b) of the Revenue Act of 1926) is limited to an overpayment of an estate tax which is "alleged to have been erroneously or illegally assessed or collected". In other words, when Congress in 1926 removed the estate tax from the scope of Section 3228 of the Revised Statutes (Revenue Act of 1926, §1112) and enacted a separate and special provision relating to estate tax (§319(b) of the Revenue Act of 1926) it *retained* in the estate tax statute (and did *not* eliminate as it did in the case of the corresponding *income* tax statute) the phrase

[1] In so far as material to our argument, the corresponding provisions of income tax Acts subsequent to the Revenue Act of 1924 were substantially the same as those quoted above.

"alleged to have been erroneously or illegally assessed or collected" contained in Section 3228. Therefore, we respectfully submit that cases and rulings dealing with Section 281 of the Revenue Act of 1921 or similar successor sections of subsequent income tax Acts, are not controlling and, indeed, have no bearing on the issue presented in this case.

Second, in all of the other cases cited by the Government (Br. 15, 16, 21), as well as in the income tax cases above referred to, the payments there in question had been made *after* the filing of the tax return or the assessment of the tax, or at least contemporaneously therewith. The status of a remittance by a taxpayer *in advance* of his filing a tax return, was not involved.

The Government seeks to belittle the construction of the statute for which we contend by characterizing it as "novel" (Br. 14). But there is no "novelty" about it. As long ago as 1904, the opinion of this Court in *Chesebrough* v. *United States*, 192 U. S. 253 (cited by the Government, Br. 19), at least pointed the way to such a construction. Although it is true that in the *Chesebrough* case the taxpayer's petition was dismissed on the ground that the tax could not be recovered, because it had been paid voluntarily and without objection, nevertheless, the Court had occasion to comment on Section 3226 of the Revised Statutes which, in so far as material, provided as follows:

> "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, accord-

> ing to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof * * *."

This Court, referring to the above quoted statutory provisions, said at page 262:

> "The words 'until appeal shall have been duly made', appear to us to imply an adverse decision by the collector, at least a compelled payment, or official demand for payment, from which the appeal is taken."

And at page 263 it added:

> "This petition did not set up any ruling of the collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the Commissioner * * *."

There is no substantial difference between the claim for refund required to be filed with the Commissioner under the statute here involved, before suit can be maintained for the recovery of the tax (Internal Revenue Code §3772(a)(1)) and the "appeal" to the Commissioner considered by this Court in the *Chisebrough* case. Both, we submit, imply that there has been some prior administrative decision or ruling either specific or resulting from an assessment or other official demand for the amount paid. At least one of the functions of a claim for refund under the statute here in question (as was the function of the former "appeal" to the Commissioner) is to obtain a reconsideration or review of the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax.

But indeed the Government itself on other occasions, in briefs which it has submitted to this and other courts, has contended for a construction of the statute which does not differ substantially from that which we are urging.

For example, in its brief in *Moses* v. *United States*, 28 F. Supp. 817, the Government said at page 4:

> "There cannot be any payment of taxes until there is a determination of liability, because until such time there is nothing against which payment can be credited. On December 24, 1932, no return had been filed and no assessment had been made."

And on page 2 of its supplemental brief in the same case the Government stated:

> "There is no authority whatever in the Collector to accept moneys in payment of taxes for which no return has been filed and of which there is no assessment. No statute or other authorization, has been found by counsel on either side giving the Collector authority to accept moneys on behalf of taxes, not submitted with a return and not in payment of any outstanding assessment."

Again, in *Busser* v. *United States*, 130 F. (2d) 537, the Government in arguing that interest was not allowable on the amount of the refund there in question, said at page 15 of its brief:

> "It [the allowance of interest] would make the Government liable where it has neither delayed nor defaulted, and where, indeed, the interest would become due solely because the taxpayer, *without filing a return*, overestimated his tax liability in a situation where, because there is no

return, the Collector is helpless to check the estimate. For as stated in *Moses* v. *United States*, *supra*, at p. 818:

> "When a taxpayer submits a return and accompanies it by payment, the Collector is put on notice then of the facts upon which the existence of a tax debt depends. He may, at that time, immediately check it. If he does not, he accepts the taxpayer's statement of the amount due and the parties are then in agreement and the whole amount received is given and taken as payment * * *. In this case [where the remittance had been made in advance of the filing of the tax return], the Government was powerless at the time the money was delivered to it to determine how much, if any, was actually due."

Indeed, in the Government's brief in the case at bar, submitted in opposition to our petition for certiorari, it stated at page 11:

> "As was pointed out in both the *Busser* and *Atlantic Oil* cases, *supra*, when an excessive payment is made *in advance of the tax return* the Collector is not guilty of a mistake in retaining the amount, since he has no means of determining the true liability." (Italics ours.)

Similarly, we contend that in such a situation the Collector is not guilty of any mistake or illegality in retaining the remittance pending the filing of the return, and thus it may not properly be charged that there has been an erroneous or illegal assessment or collection of the tax.

The Government argues (Br. 23) that the construction of the statute for which we are contending would result in "an exceedingly harsh rule for taxpayers" because "the taxpayer ordinarily does not know when

the actual assessment is made." But Section 3655(a) of the Internal Revenue Code requires the Collector, within ten days after receiving the assessment from the Commissioner, to give notice thereof to the taxpayer.

The Government refers to our argument as being that the cause of action accrues in all cases at the time the tax is assessed. This, of course, is incorrect. Normally the cause of action will accrue at the time of the payment because the tax will be assessed on the filing of the return or after the determination of a tax deficiency. It is only where the remittance is made in advance of the assessment that the cause of action will accrue at the time of the erroneous assessment because then for the first time the two necessary elements of the cause of action will co-exist.

The Government states (Br. 23) that we "would contend that even if an additional assessment were paid within three years before the filing of a claim, the taxpayer could not recover any of the tax attributable to an error on the original return." This statement is incorrect. If an additional tax is assessed which is in excess of the total tax due, it makes no difference whether the resulting excess is traceable to an error originating with the taxpayer in his return or originating with the Commissioner on his audit. In either case, the additional tax over and above the amount properly due is *erroneously and illegally assessed and collected.*

Next, the Government argues that according to our theory "interest [on a tax refund] should run not from the date of the overpayment * * * but from the date of the assessment since it was not until that date that the tax became one 'erroneously or illegally assessed

or collected' " (Br. 23). But the statute dealing with interest on tax refunds does *not* now so read. Section 3771(a) of the Internal Revenue Code, in so far as material, provides:

> (a) Interest shall be allowed and paid upon any overpayment *in respect of* any internal revenue tax at the rate of 6 per centum per annum.
>
> (b) Such interest shall be allowed and paid as follows:
>
> * * * *
>
> (2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. * * *" (Italics ours.)

Thus, the present statute dealing with interest on tax refunds, does not contain the phrase "erroneously or illegally assessed or collected".

On page 24 of its brief the Government seems to argue that *even if* in April, 1938, the Commissioner on auditing the estate tax return had determined that it was correct in all respects as filed, nevertheless, the petitioners would have been barred by the statute here in question (and Internal Revenue Code §3772(a)) from recovering the balance of $39,775.76 which would have remained to their credit in Account #9. As authority for this contention the Government cites *United States* v. *A. S. Kreider Co.*, 313 U. S. 443, which merely held that a suit for the recovery of an alleged overpayment of income tax is governed by the specific statute of limitations applicable to such a suit

and not by the general six-year statute of limitations contained in Section 156 of the Judicial Code (28 USCA §262).

But this argument of the Government obviously begs the question. It is true, as the Government asserts, that *this suit* is brought for the recovery of a tax, but in the assumed case, the petitioners would have been entitled to recover the balance remaining to their credit in Account #9, *not* as an overpayment of tax (that is to say, not as a tax "alleged to have been erroneously or illegally assessed or collected") but under Section 145 of the Judicial Code (28 USCA §250(d)) as an acknowledged indebtedness owing to them by the Government as shown by its own records and accounts, which the Government had impliedly promised to pay (*Ball* v. *United States*, 295 U. S. 247, 261; *United States* v. *State Bank*, 96 U. S. 30, 35-36). Obviously *United States* v. *A. S. Kreider Co.*, *supra*, would not apply in such a case.

The situation which we have assumed in the hypothetical case is precisely that which actually existed *immediately prior to the assessment of the additional tax* in April, 1938. Petitioners then had a valid claim against the Government under Sections 145 and 156 of the Judicial Code to recover the balance then standing to their credit in Account #9. This valid claim was in effect seized by the Collector in April, 1938, and applied by him in partial payment of the additional tax which was then assessed. It was *then* and not until then that petitioners' claim was converted from a claim under Section 145 of the Judicial Code into a claim for the recovery of a tax "alleged to have been erroneously or illegally assessed or collected". Thus, it was then and not until then that the statute

here involved and Section 3772(a) of the Internal Revenue Code and *United States* v. *A. S. Kreider Co.*, *supra*, became applicable.

The Government seems to concede (Br. 18) that the amendment of Section 3228 of the Revised Statutes in 1921, to substitute the present phrase "next after the payment of such tax" for the former phrase "next after the cause of action accrued", did not accomplish any change in existing law.[2] We must assume, therefore, that such result was intended by Congress. Moreover, since that time Congress has not made any relevant amendment of Section 3228 of the Revised Statutes or the statute here involved which was derived therefrom. All that Congress did in 1924 was to amend another and different section of the Revised Statutes, namely, Section 3226 (dealing with the maintenance of *suits* for the recovery of taxes) so as to permit suit to be maintained, notwithstanding that the tax had not been paid under protest and duress. Thus, while the general law in respect of protest and duress has been changed, there has been

[2] Although the result reached by the Court in *Ordway* v. *United States*, 37 F. (2d) 19 (Br. 18), clearly seems to be correct, we respectfully submit that the *assumption* which was made both by the Bureau and the taxpayer that the "cause of action" referred to in Section 3228 of the Revised Statutes as it read prior to the 1921 amendment (§1316 of the Revenue Act of 1921), would accrue when the executors' commissions and other administration expenses were allowed by the Surrogate's Court on an accounting, plainly was incorrect. The "cause of action" referred to in Section 3228 of the Revised Statutes arose upon the payment of the additional tax erroneously assessed by the Commissioner when he disallowed those deductions. The statute required the Commissioner to determine the taxable estate after allowing those deductions, and if he failed to do so, his increase in the net taxable estate and the assessment of an additional tax was erroneous, notwithstanding that in order to demonstrate such error it was necessary to resort to some subsequent event, namely, the accounting in the Surrogate's Court.

no change with respect to Section 3228 and the statute here involved in so far as they provide that one of the necessary elements of the claim for refund or cause of action to which they relate is the alleged erroneous or illegal action of the administrative officials in assessing or collecting the tax.

II.

Concerning Subdivision 2 of Government's Brief, pages 25-35.

On page 28 of its brief the Government states:

> "* * * we submit that the evidence in this case shows an intention to pay the tax on the date the check was delivered to the Collector, even though the exact amount was not known."

In *Busser v. United States, supra*, the procedure followed by the taxpayer and the Collector in dealing with the remittance was substantially the same as in the present case. There the taxpayer's letter to the Collector, insofar as material, read as follows:

> "I therefore enclose herewith a cheque for $6800 payable to the order of the Collector of Internal Revenue, with the request that you apply this on account of the tax in the above estate ultimately shown to be due by the Estate Tax Return when filed."

The Government stated in its brief:

> "* * * Nor did either of the parties treat the transaction as a payment. Rather the trustee [*i. e.*, the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax * * * ultimately shown to be due

> by the Estate Tax Return when filed', and, in turn, the Collector did not give a receipt on the usual form used for tax payment. * * * It is, therefore abundantly clear, from the parties' own treatment of the transaction that the mutual intention requisite to constitute payment was absent here."

The Government argues that the Collector treated the original remittance "not as a deposit but as a payment of tax" (Br. 29). The procedure followed by the Collector in this case was precisely the same as that which he followed in the *Moses* and *Busser* cases, *supra*, in both of which the Government successfully contended that the remittance was treated by the Collector as a "deposit" and not as a tax payment (Petitioner's Main Brief, Point III).

The Government states on page 29 of its brief that the petitioners' letter to the Collector "did not indicate that the petitioners were paying more than they estimated that the return would disclose". We respectfully submit that petitioners' letter *did* so indicate when it stated "* * * it is contended by the executors that not all of this sum is legally or lawfully due" (R. 7). Actually the estate tax return was filed only two months thereafter and it showed that the tax liability was only $80,224.24—very substantially less than the amount of the original remittance of $120,000.

Let us assume that the petitioners had sent to the Collector their original remittance of $120,000 at the same time that they filed their tax return showing a tax liability of $80,224.24. We submit that in the assumed case the excess of $39,775.76 over the amount of the tax shown in the return could hardly be characterized as a present payment of the tax. Rather, such excess would have been money which was (to quote the Government's language) "dumped on the

Collector with no relevance to actual requirements" (Br. 33, 34).

The Government points out (Br. 33) that Section 3770 of the Internal Revenue Code was recently amended by Section 4 of the Current Tax-Payment Act of 1943. While the statute relating to interest is Section 3771 of the Internal Revenue Code, the Government states that the amendment of Section 3770 apparently makes the decisions in the *Moses* and *Bisser* cases, *supra*, inoperative. This may be true in so far as those cases dealt with the allowance of interest. The amendment, however, had no effect on the statute here involved or on the issue herein presented.

III.

Concerning Treatment of Funds in Account #9.

The statement on page 7 of the Government's brief that "All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list", perhaps requires some further explanation. Of course, under the law Collectors of Internal Revenue are required to pay over to the Treasurer of the United States *all* moneys collected by them (26 USCA §3671(a)). Moneys held by the Collector in Suspense Account #9 are so paid over. But they are *not* paid to the Treasurer of the United States as moneys belonging to the Government. In the present case the Court of Claims found (R. 8) that the Collector placed the original remittance of $120,000 "to the credit of that estate [estate of Louis Rosenman] in Account 9 in his books". It also found that "The balance of such

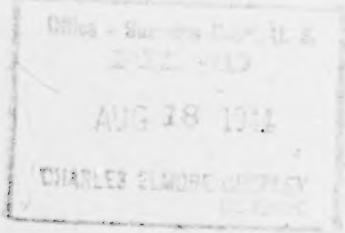
amount of $120,000, that is, $39,775.76, remained in Account-9 to the credit of the estate until April 1938, as shown by findings 8 and 9". Obviously, the same amount may not stand to the credit of two different persons at the same time and, therefore, we submit that it is sufficiently clear from the findings of the Court below that although the actual cash representing the original remittance of $120,000 was paid over to the Treasurer of the United States, it was, nevertheless, paid over to him to be held for the account and to the credit of the estate as shown by the Collector's books. In other words, when the cash was paid over to the Treasurer of the United States, the cash account of the Treasurer must have been correspondingly debited or else the Collector's books would not have balanced because on his books the amount in question was being held for the account and to the credit of the estate.

The Government in its brief in *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766, recognized that the procedure which we have just mentioned, whereby amounts in Account #9 are paid over by the Collector to the Treasurer of the United States, was of no significance. It stated at page 26 of its brief:

> "The Collector did the only thing he could to indicate that the deposit was not a 'normal' tax payment when he credited it to Suspense Account 9. That action once and for all served to distinguish it from a tax payment. What happened afterwards in the way of covering it into the Treasury, et cetera, is unimportant."

Respectfully submitted.

CHARLES ANGLO,
Counsel for Petitioners.



No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1944

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 13–18) is reported in 53 F. Supp. 722.

JURISDICTION

The judgment of the Court of Claims was entered April 13, 1944. (R. 18–19.) The petition for a writ of certiorari was filed June 29, 1944. (R. 19.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The executors of an estate having received an extension of time within which to file the estate tax return made a payment of estimated tax due which was deposited as an internal revenue collection by the Collector in a so-called suspense account to the credit of the Treasurer of the United States. Later when the tax was determined and assessed this amount was applied against the assessment. The question involved is whether a claim for refund filed more than three years from the date of the actual payment, but within three years from the time the Collector applied the amount against the assessment, is timely, under Section 319 (b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 304 (a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (2) the de-

ductions allowed under section 303; (3) the value of the net estate of the decedent as defined in section 303; and (4) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

* * * * *

SEC. 305. (a) The tax imposed by this title shall be due and payable one year after the decedent's death, and shall be paid by the executor to the collector.

(b) Where the Commissioner finds that the payment on the due date of any part of the amount determined by the executor as the tax would impose undue hardship upon the estate, the Commissioner may extend the time for payment of any such part not to exceed five years from the due date. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(c) If the time for the payment is thus extended there shall be collected, as a part of such amount, interest thereon at the rate of 6 per centum per annum from the expiration of six months after the due date of the tax to the expiration of the period of the extension.

* * * * *

SEC. 306. As soon as practicable after the return is filed the Commissioner shall

examine it and shall determine the correct amount of the tax.

SEC. 319 [as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 810]. * * *

(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

* * * * *

Treasury Regulations 80 (1934 ed.):

ART. 69. *Extension of time by Commissioner.*—If it is impossible for the executor to file a reasonably complete return within one year from the date of death, the Comsioner may, upon application from the executor showing good and sufficient cause, grant an extension of time not to exceed six months from the due date. Before the expiration of the extension period granted a return as complete as possible must be filed. The return thus filed will be the return required by section 304 (a) and any tax shown thereon will be the "amount determined by the executor as the tax" referred to in section 305 (b) and section 307. Such return cannot thereafter be amended although supplemental informa-

> tion may subsequently be filed that may result in a finally determined tax different from the amount shown as the tax by the executor upon his return. An extension of time for filing the return does not operate to extend the time for the payment of the tax, which is due one year after the decedent's death. An extension of time in which to make payment of the tax may be secured as provided in article 82.

STATEMENT

The special findings of fact of the Court of Claims (R. 6–13), in so far as material to the issue involved in the petition, may be summarized as follows:

Petitioners, as executor under the will of Louis Rosenman, who died December 25, 1933, requested an extension of time on December 11, 1934, within which to file the estate tax return, which request was granted by the Commissioner of Internal Revenue on December 15, 1934 (R. 6). In the letter granting the extension, the Commissioner advised petitioners that the extension of time within which to file the return did not operate to extend the time for payment, and further stated (R. 7):

> It is suggested that the tax be estimated and paid to avoid delinquency in payment, the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

On December 24, 1934, petitioners delivered to the Collector a check for $120,000 accompanied by a letter of transmittal in which it was stated, *inter alia:* "We are delivering to you herewith, by messenger, an Estate check payable to your order, for $126,000, as a payment on account of the Federal Estate tax" (R. 7).

At the time the Collector received the above-mentioned sum of $120,000, no assessment of estate tax was outstanding against the estate of Louis Rosenman, and on December 26, 1934, the Collector placed the sum of $120,000 to the credit of that estate in Account 9. Account 9 is a suspense account in the books of the Collector of Internal Revenue for the First District of New York to which monies received in connection with federal estate taxes, and other miscellaneous taxes, are deposited if no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7–8.)

Later the petitioners filed an estate tax return showing a tax due of $80,224.24, which was assessed in March 1935. On March 22, 1935, the amount of $120,000 was classified, and $80,224.24 thereof was credited against the assessment. The

balance of such amount of $120,000, i. e., $39,775.76, remained in Account 9 to the credit of the estate until April 1938. (R. 8.) On March 28, 1935, the Collector notified the petitioners of the application of $80,224.24 to the assessment in that amount (R. 8). On March 26, 1938, petitioners filed a claim for the refund of $39,775.76 on the ground that according to the notice and demand forwarded by the Collector on March 28, 1935, such amount was due and owing to them (R. 8).

Upon a subsequent audit of the estate tax return, the Commissioner determined that the total tax due after allowance for state estate and inheritance tax payment was $128,759.08, resulting in a deficiency of $48,534.84. Petitioners were duly notified of this deficiency and it was assessed in April 1938. (R. 8–9.) In April 1938, the Collector applied the balance of $39,775.76 to the credit of petitioners in Account 9 in partial satisfaction of the deficiency, and payment of the balance of the assessment, i. e., $8,759.08, together with interest thereon of $1,738.26, was demanded. On April 22, 1938, petitioners paid to the Collector the total amount so demanded of $10,497.34. (R. 9.)

On May 20, 1940, petitioners filed with the Collector a claim for refund of $24,717.12 upon the ground that the estate was entitled to additional deductions for executors' commissions, attorneys' fees, miscellaneous administration expenses, and

for $25,000 paid to Martin Rosenman in settlement of a claim against the estate of the decedent. The Commissioner duly rejected the claims for refund filed on March 26, 1938, and May 20, 1940. (R. 9.) This suit was instituted in the Court of Claims within two years from such rejection (R. 1).

The court below held upon the foregoing facts that the petitioners were entitled to certain deductions claimed (R. 18), but that any resulting refund in excess of the amount of $10,497.34, the amount paid on April 22, 1938, was barred by the statute of limitations (R. 16). Judgment was accordingly rendered for $10,497.34 with interest (R. 18–19).

ARGUMENT

1. The decision below is correct. Section 319 (b) of the Revenue Act of 1926, as amended, *supra*, required that all claims for the refunding of estate tax shall be filed "within three years next after the payment of such tax." This requirement of the statute must be strictly complied with in a suit brought against the United States. Cf. *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141, and *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. On December 24, 1937, three years after the delivery to the collector of petitioners' check for $120,000, no claim for refund had been filed.

That the delivery of the check constituted payment for purposes of the statute of limitations

is clear. Petitioners sought an extension of time only for the filing of the estate tax return. Permission for this late filing was granted, but the Commissioner expressly advised that this did not operate to extend the time for the payment of the tax, which under the provisions of Section 305 (a) of the Revenue Act of 1926, *supra*, was due one year after the decedent's death. Petitioners accordingly sent a check for the estimated tax, stating that it was "a payment on account of the Federal Estate tax" (R. 7). This amount was paid at a time when the tax was due and owing to the Government, though the amount thereof had not been determined because of the failure to file an estate tax return. This amount was credited to so-called Account 9; payments thus placed are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7–8.) When, later, part of this amount was applied to a deficiency assessed by the Collector, interest was not charged against the estate on that portion of the deficiency. (R. 9.) From every point of view, therefore, payment which started the running of the statute of limitations was made at the time the check was delivered, and not, as petitioners contend, when part of the proceeds of the check was transferred by the bookkeeping entry from

Account 9 and applied in partial satisfaction of the tax deficiency.

There is no conflict of decisions. No other case has dealt with the problem of the running of the statute of limitations when payment is made on account of tax liability in advance of the filing of the return. The petition alleges a conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Busser* v. *United States*, 130 F. (2d) 537. That case involved the question whether the taxpayer was entitled to interest under Section 614 of the Revenue Act of 1928, c. 852, 45 Stat. 791, which allows interest "upon any overpayment in respect of any internal-revenue tax, * * *." The court held that the taxpayer was not entitled to interest on an amount paid in advance of the due date, which was later determined to be an overpayment and refunded. The same result was reached in *Moses* v. *United States*, 28 F. Supp. 817 (S. D. N. Y.), and a contrary result was reached in *Atlantic Oil Producing Company* v. *United States*, 35 F. Supp. 766 (C. Cls.).[1] Whether interest is allowable as on an overpayment, in the event of such a refund, is a question distinct from that in the present case. While there is statutory provision

[1] At the time of the *Atlantic Oil* decision there was no conflict, and the Government did not petition for certiorari. In the subsequent *Busser* case, decided in the Government's favor, the taxpayer did not petition.

for interest on "overpayments," that provision must be interpreted in the light of the concept of interest and the reasons for its allowance. As was pointed out in both the *Busser* and *Atlantic Oil* cases, *supra*, when an excessive payment is made in advance of the tax return, the Collector is not guilty of a mistake in retaining the amount, since he has no means of determining the true liability. The payment is made for the convenience of the taxpayer, who should not be permitted to earn interest on so much of the payment as is found to be excessive.[2] We do not believe that review of the present decision would serve to resolve the question whether interest is allowable in the event of partial refund of an amount paid in advance of the tax return.

The decision below does not lead to any confusion nor does it, as petitioners contend, "tend to discourage taxpayers from making such deposits." (Pet., p. 10.) Taxpayers will doubtless continue to make such deposits in order to avoid payment of interest and penalties on taxes due.

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[2] In the *Busser* case, moreover, the circuit court of appeals appeared to regard the payment as not then being due. The court said (p. 539):

"* * * At the time the check was sent here, there was nothing due. Time for tax settlement had been extended; the remittance, while an entirely proper thing to make, and a safeguard against interest charges against the taxpayer, was entirely voluntary."

In the present case, the Collector made it clear that the time for payment was not extended.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions on the precise question involved. The petition should be denied.

Respectfully submitted.

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AUGUST 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1944

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OPINION BELOW

The opinion of the Court of Claims (R. 13–18) is reported in 53 F. Supp. 722.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1944 (R. 18–19). The petition for a writ of certiorari was filed on June 29, 1944 (R. 19), and was granted on October 9, 1944 (R. 19).

The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The executors of an estate, having received an extension of time within which to file the estate tax return, made a payment of estimated tax due in December 1934, which was deposited as an internal revenue collection by the Collector in a "suspense account" to the credit of the Treasurer of the United States. In 1935, part of the payment was credited against the tax assessed on the basis of the return, and in 1938, the balance was credited against a deficiency assessment. The question is whether a claim for refund filed more than three years from the date of the actual payment in 1934, but within three years from the time the Collector applied the remainder against the deficiency assessment in 1938, is within time to permit recovery of any part of the latter amount under Section 319 (b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 304. (a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in

such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (2) the deductions allowed under section 303; (3) the value of the net estate of the decedent as defined in section 303; and (4) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

* * * * *

SEC. 305. (a) The tax imposed by this title shall be due and payable one year after the decedent's death, and shall be paid by the executor to the collector.

(b) Where the Commissioner finds that the payment on the due date of any part of the amount determined by the executor as the tax would impose undue hardship upon the estate, the Commissioner may extend the time for payment of any such part not to exceed five years from the due date. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(c) If the time for the payment is thus extended there shall be collected, as a part of such amount, interest thereon at the

rate of 6 per centum per annum from the expiration of six months after the due date of the tax to the expiration of the period of the extension.

* * * * *

SEC. 306. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SEC. 319 [As amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 810]. * * *

(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

* * * * *

Treasury Regulations 80 (1934 ed):

ART. 63. *When return required—Date of filing.*—* * * In the case of a resident, the return must be filed with the collector in whose district the decedent had his domicile at the time of death. * * * It must be filed in duplicate within one year after the date of death, or, in any particular instance, at such time prior to the expira-

tion of such year as the Commissioner may designate. If the due date for filing the return falls on a Sunday or on a legal holiday, the due date for filing will be the day following such Sunday or legal holiday.

* * * * *

ART. 64. *Persons liable for return.*—* * * If, in any case, the executor is unable to make a complete return as to any part of the gross estate, he is required to give all the information he has as to such property, including a full description, and the name of every person holding a legal or beneficial interest in the property. * * *

* * * * *

ART. 69. *Extension of time by Commissioner.*—If it is impossible for the executor to file a reasonably complete return within one year from the date of death, the Commissioner may, upon application from the executor showing good and sufficient cause, grant an extension of time not to exceed six months from the due date. Before the expiration of the extension period granted a return as complete as possible must be filed. The return thus filed will be the return required by section 304 (a) and any tax shown thereon will be the "amount determined by the executor as the tax" referred to in section 305 (b) and section 307. Such return cannot thereafter be amended although supplemental information may subsequently be filed that may result in a

> finally determined tax different from the amount shown as the tax by the executor upon his return. An extension of time for filing the return does not operate to extend the time for the payment of the tax, which is due one year after the decedent's death. An extension of time in which to make payment of the tax may be secured as provided in article 82.

STATEMENT

The special findings of fact of the Court of Claims (R. 6–13), insofar as material to the issue involved herein, may be summarized as follows:

On December 11, 1934, petitioners, as executors under the will of Louis Rosenman, who died on December 25, 1933, requested an extension of time within which to file the federal estate tax return for the estate [1] (R. 6).

On December 15, 1934, the time to file the estate tax return was extended by the Commissioner of Internal Revenue to February 25, 1935 (R. 6–7). In the letter granting the extension, the Commissioner advised petitioners that the extension of time within which to file the return did not operate to extend the time for payment, and further stated (R. 7):

> It is suggested that the tax be estimated and paid to avoid delinquency in payment.

[1] Since the decedent died on December 25, 1933, the estate tax was due and payable under Section 305 (a) of the Revenue Act of 1926 on December 25, 1934.

> the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

On December 24, 1934, petitioners delivered to the Collector a check for $120,000 accompanied by a letter of transmittal in which it was stated, *inter alia* (*ibid.*):

> We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax.

On December 26, 1934, the Collector placed the sum of $120,000 to the credit of the estate in Account 9. Account 9 is a suspense account in the books of the Collector of Internal Revenue for the First District of New York to which monies received in connection with federal estate taxes, and other miscellaneous taxes, are deposited if, as here, no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7–8.)

On February 25, 1935, petitioners filed an estate tax return showing a tax due of $80,224.24. After the return was filed, the tax was assessed and on March 22, 1935, the amount of $120,000

was classified and $80,224.24 thereof was credited against the assessment of the latter amount. The balance of the $120,000 ($39,775.76) remained in Account 9 to the credit of the estate until April 1938. (R. 8.)

On March 28, 1935, the Collector forwarded to petitioners a notice and demand for estate tax which showed that the $120,000 paid in December 1934 had been credited to Account 9 and that $80,224.24 thereof had been applied in satisfaction of the tax assessed. On March 26, 1938, petitioners filed with the Collector a claim for the refund of $39,775.76 on the ground that the notice and demand forwarded to them by the Collector showed that that amount was due and owing to the petitioners. (R. 8.)

Subsequently, an audit by the Commissioner of the federal estate tax return showed a total net tax of $128,759.08. After taking into account the amount shown due on the return, an estate tax deficiency of $48,534.84 was determined and notice thereof was mailed to the petitioners. No appeal having been taken by the petitioners to the Board of Tax Appeals, the deficiency of $48,534.84 was assessed in April 1938. In the same month the Collector applied the balance of $39,775.76 standing to the credit of petitioners in Account 9 in partial satisfaction of the deficiency of $48,534.84 and demanded payment of the bal-

ance of the assessment ($8,759.08), together with interest thereon ($1,738.26). (R. 8–9.)

On April 22, 1938, petitioners paid to the Collector the total amount so demanded of $10,497.34. (R. 9.)

On May 26, 1938, the Commissioner rejected the claim for refund filed on March 26, 1938, upon the ground that, since a deficiency had been assessed, there was accordingly no overpayment. (R. 9.)

On May 20, 1940, petitioners filed with the Collector a claim for refund of $24,717.12, upon the ground that in computing the net estate additional deductions should be allowed for executors' commissions, attorneys' fees, miscellaneous administration expenses and an additional amount paid in settlement of the claims. On May 22, 1940, the Commissioner rejected this claim on the ground that no evidence had been submitted in support of the deductions claimed and that the tax in excess of $10,497.34 had been paid more than three years prior to the filing of the claim. (R. 9.)

Upon the foregoing facts, the Court of Claims held that petitioners were entitled to certain of the deductions claimed (R. 18), but that any resulting refund in excess of the amount of $10,497.34, the amount paid on April 22, 1938, was barred by the statute of limitations (R. 16). Judgment was accordingly rendered for petitioners for $10,497.34, with interest (R. 18–19).

SUMMARY OF ARGUMENT

Section 319 (b) of the Revenue Act of 1926, as amended, requires that a claim for refund of estate taxes be filed within three years next after the payment of the tax and limits recovery to the amount paid within such period. The limitations are based solely on the time of payment and are not concerned with the grounds of the assessment. When considered with the provisions of other Sections of the statute dealing with the date when the tax is due and the requirements for filing returns, the statute would seem to mean that the date when the tax due and owing is paid to the Collector starts the running of the statute. In the instant case this date was December 24, 1934, when the check for the estimated tax due was delivered to the Collector.

It is immaterial that the estate tax return when filed showed a lesser amount due and that the difference between the amount paid and that shown due on the return was retained by the Collector and later credited against a deficiency in tax determined to be due.

The acts of the parties show their intention that the December 1934 delivery of the check for the estimated tax due was a "payment" of the tax. The decisions of other courts involving the question of what constitutes an "overpayment" under the provisions allowing interest on overpayments are in conflict and those which hold that the excess of the payment made in advance of filing the return over

the tax finally determined to be due was not an overpayment turned in part on the rule of construction that the sovereign is not liable for interest in the absence of clear statutory authority. In any event, in view of the amendment to Section 3770 of the Internal Revenue Code made by the Current Tax Payment Act of 1943, the interest question has been solved in a manner consistent with the decision in this case since the payment here was made in accordance with requirements of the statute. Orderly administration of the revenue laws requires that taxpayers should be able to ascertain the limitations on filing claims for refund. The provision that the statutory period starts to run when payment is originally made to the Collector, whether by check or cash, is a reasonable one.

ARGUMENT

SINCE NO PAYMENT OF THE TAX IN EXCESS OF $10,497.34 WAS MADE WITHIN THREE YEARS OF THE FILING OF THE CLAIM ON WHICH THIS SUIT IS BASED, SECTION 319 (B) OF THE REVENUE ACT OF 1926, AS AMENDED, BARS RECOVERY OF ANY GREATER AMOUNT

The filing of a timely claim for refund is a prerequisite to a suit for the recovery of taxes. *Rock Island &c. R. R.* v. *United States,* 254 U. S. 141; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. Section 319 (b) of the Revenue Act of 1926, as amended (*supra,* p. 4) requires that all claims for the refunding of estate tax shall be filed

"within three years next after the payment of such tax." It further provides that the amount of the refund "shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim." Two claims for refund were filed in this case, one on March 26, 1938, and one on May 20, 1940, but taxpayer relies solely upon the claim for refund filed on May 20, 1940, and must necessarily do so, since the earlier claim filed on March 26, 1938, did not raise the issues raised in this proceeding and cannot form the basis of any recovery.[2] *Real Estate Title Co.* v. *United States*, 309 U. S. 13; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269.

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[2] This suit is based on the contention that the Commissioner erred in disallowing certain deductions in determining the deficiency asserted (R. 4). The claim for refund filed on March 26, 1938, was based on the ground that the amount paid in advance of filing the return exceeded the tax disclosed by the return (R. 8). Consequently, even if the March 1938 claim were timely, it would not support a recovery of any amount in this suit. This is true even if it could be regarded as a general claim subject to amendment, though we think it could not. *United States* v. *Andrews*, 302 U. S. 517; *Rogan* v. *Taylor*, 136 F. 2d 598 (C. C. A. 9th). Since the March 1938 claim had been rejected on May 26, 1938 (R. 9), prior to the filing of the claim of May 20, 1940, the latter claim could not be regarded as amending the preceding one. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *American Bosch Magneto Corp.* v. *United States*, 6 F. Supp. 455 (C. Cls.); *Solomon* v. *United States*, 57 F. 2d 150 (C. C. A. 2d); *Dysart* v. *United States*, 95 F. 2d 652 (C. C. A. 8th), certiorari denied, 305 U. S. 608.

On the basis of the claim filed on May 20, 1940, the court below allowed recovery of $10,497.34, the amount of tax paid on April 22, 1938. It limited recovery to that amount on the ground that it was the only portion of the tax paid within three years of the filing of the claim, the remainder of the tax having been paid on December 24, 1934, when the check for $120,000 was delivered to the Collector.

1. If the court below was correct in holding that no more than $10,497.34 was paid within three years of May 20, 1940, the allowance of any greater refund would seem to be precluded by the plain language of Section 319 (b), and the petitioners did not contend otherwise in the court below. Their contention there was that $39,775.76 of the tax was not paid until April 1938, the advance payment of $120,000 being merely a deposit, and hence that they were entitled to recover the full sum for which this suit was brought.[3] While the deposit argument is renewed here (Br. 12–16), the petitioners now deny that the case necessarily turns on the time of payment and assert that the phrase "within three years next after the payment

[3] The suit was brought for the recovery of $24,717.12 (R. 5). It will be noted that the Court of Claims has not determined the exact amount of the overpayment by petitioners, but has decided only that recovery should be limited to $10,497.34 paid on April 22, 1938 (R. 18–19). If, therefore, this Court should reverse the judgment of the Court of Claims, the case would have to be remanded for further proceedings.

of such tax" in the first sentence of Section 319 (b), as amended, and "the portion of the tax paid during the three years immediately preceding the filing of the claim" in the second sentence refer to payment of the tax with respect to which the cause of action arises. The contention (Br. 7–12) apparently is that the cause of action with respect to $39,775.76 arose in April 1938, when that amount was applied against the deficiency, since at no earlier time had the Commissioner or the Collector done any wrongful act.

The petitioners cite no decisions in support of this novel construction of the statute and we know of none. General provisions basing the period of limitations for filing refund claims of internal revenue taxes on a specified number of years after payment of the tax have been in effect since the amendment of Section 3228 of the Revised Statutes by Section 1316 of the Revenue Act of 1921, c. 136, 42 Stat. 227. See *Ordway* v. *United States*, 37 F. 2d 19 (C. C. A. 2d). A separate provision thus limiting the time for filing claims for income tax and estate tax refunds first appeared respectively in Section 281 (b) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253,[4] and Section 319 (b) of the

[4] See, however, Section 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which provided that claims for refund of income taxes might be filed within five years after the return was due, and compare Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227.

Revenue Act of 1926, c. 27, 44 Stat. 9. Section 281 (b) (2) also limited the amount of the recovery to the amount of tax paid within the specified period, but it was not until 1932 that Section 319 (b) was amended by Section 810 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to impose a similar limitation as to estate taxes and Section 3228 of the Revised Statutes was amended by Section 1106 to impose a like limitation as to other internal revenue taxes.

Under the earlier statutes which did not limit the amount of recovery to the amount paid within the specified period, as, for example, under Section 3228 of the Revised Statutes as it stood prior to the enactment of Section 1106 of the Revenue Act of 1932, or under Section 319 (b) of the Revenue Act of 1926 prior to the enactment of Section 810 of the Revenue Act of 1932, it was held in many cases not only that the time ran from the last payment but that if the claim was filed within the specified period, recovery could be had of an amount in excess of the sum paid within such period. *Union Trust Co.* v. *United States*, 70 F. 2d 629 (C. C. A. 2d), certiorari denied, 293 U. S. 564; *United States* v. *Magoon*, 77 F. 2d 804 (C. C. A. 9th); *United States* v. *Clarke*, 69 F. 2d 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 78 F. 2d 534 (C. C. A. 4th); *Hills* v. *United States*, 50 F. 2d 302, 55 F. 2d 1001, 8 F. Supp. 849 (C. Cls.), all of which cases involved estate

taxes. In several of these cases, recovery was allowed on the basis of errors made on the return, though the only tax paid within the prescribed period was an additional tax. *United States* v. *Clarke*, 69 F. 2d 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Hills* v. *United States*, 50 F. 2d 302, 55 F. 2d 1001, 8 F. Supp. 849 (C. Cls.). This failure to limit the amount of recovery of estate taxes was, as stated, cured by the 1932 amendment.[1] See *Rogan* v. *Taylor*, 136 F. 2d 598 (C. C. A. 9th).

Many cases involving other taxes have held or assumed, without argument, that time of payment of the tax alone determines the limit for filing

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[1] It was probably the first decision (50 F. 2d 302) in the *Hills* case, which led to the 1932 amendments made to Section 3228 of the Revised Statutes and Section 319 (b) of the Revenue Act of 1926. The purpose, as disclosed by legislative history, was to prohibit expressly refund of any portion of the tax not paid within the specified period. See H. Rep. No. 708, 72nd Cong., 1st Sess., p. 50 (1939–1 Cum. Bull. (Part 2) 457); S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 53, 58 (1939–1 Cum. Bull. (Part 2) 496) and Statement of Managers of the House, H. Conference Rep. No. 1492, 72nd Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 539). See also *Brewer* v. *National Life & Acc. Ins. Co.*, 119 F. 2d 313 (C. C. A. 6th), certiorari denied, 314 U. S. 624, which criticizes the *Hills* case. The *National Life* case, however, involved the time limit for the institution of suits under Section 1113 (a) of the Revenue Act of 1924, reenacting Section 3226 of the Revised Statutes. The time for instituting a suit for recovery of any tax under that statute is five years from the date of payment of such tax unless suit is instituted within two years after rejection of the claim. See *United States* v. *A. S. Kreider Co.*, 313 U. S. 443.

claims and the amount of recovery allowable under provisions similar to Section 319 (b), as amended, governing claims for refund of such taxes. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Chicago Golf Club*, 84 F. 2d 914 (C. C. A. 7th); *San Joaquin Light & Power Corp.* v. *McLaughlin*, 65 F. 2d 677 (C. C. A. 9th); *Sugar Land Ry. Co.* v. *United States*, 48 F. 2d 973 (C. Cls.); *Mohawk Rubber Co.* v. *United States*, 25 F. Supp. 228 (C. Cls.), certiorari denied, 307 U. S. 645. The decisions, therefore, are in general opposed to any theory that the limitation on the time for filing the claim depends on when the particular assessment involving the error was paid. Furthermore, the Commissioner ruled at an early date that under Section 281 (b) (2) of the Revenue Act of 1924, a claim for refund filed within four years after payment of tax was timely and permitted recovery of the amount of tax paid within the four-year period irrespective of the basis on which the assessment of the tax during the specified period was made. S. M. 3380, IV-1 Cum. Bull. 80 (1925).

The petitioners' construction of Section 319 (b) rests chiefly on the contention that it was derived from Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921; that prior to the amendment in question, Section 3228 required claims to be filed within a

specified number of years "next after the cause of action accrued"; and that no change was intended when the phrase "next after the payment of such tax" was substituted. See *Ordway* v. *United States*, 37 F. 2d 19 (C. C. A. 2d). The argument is (Br. 7–8) that when the amendment was made in 1921, it was settled law that a tax could not be recovered back in a lawsuit even though erroneously or illegally collected unless paid under protest or duress; that necessarily such payment fixed the time of accrual of the cause of action (*Savings Institution* v. *Blair*, 116 U. S. 200, 204; *Public Service Corp. of New Jersey* v. *Herold*, 279 Fed. 352, 354 (C. C. A. 3d)); and hence, in substituting the new phrase, Congress was not changing the law but was merely clarifying it by specifying the particular event which under the law as it then stood fixed the time of accrual of the cause of action.

It may be true, as the petitioners urge, that the amendment of Section 3228 of the Revised Statutes by Section 1316 of the Revenue Act of 1921 did not accomplish any change in existing law with regard to claims that would support a suit to recover taxes, except to extend the time to file a claim for two years after the tax was paid to four years. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 32 (1939–1 Cum. Bull. (Part 2) 181). But if so, this was probably not for the reason that the language of the amendment had no different meaning but because, as a

condition precedent to recovery by suit, existing law required payment of the tax under protest, a requirement that was removed by Section 1014 of the Revenue Act of 1924, amending Section 3226, of the Revised Statutes. Before this amendment the Commissioner could voluntarily refund taxes paid without protest (see *Chesebrough* v. *United States*, 192 U. S. 253; see also *Fox* v. *Edwards*, 287 F. 2d 669 (C. C. A. 2d)); but so long as the particular payment sought to be recovered by suit had to be paid under protest, the taxpayer could not recover a tax voluntarily paid on the basis of his return, even if the claim was filed within the specified period of time.[6] The amendment of Section 3226 by the 1924 Act, however, remedied a situation which had been regarded as extremely unfair to taxpayers (S. Rep. No. 398, 68th Cong., 1st Sess., pp. 44–45 (1939–1 Cum. Bull. (Part 2) 266)), and it will be noted that it was construed as being applicable where suit was brought after the enactment of the statute, even though taxes were paid prior thereto. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373.

Inasmuch as payment under protest is no longer required even for recovery by suit, there is no basis for holding that the term "payment of such tax" as used in Section 319 (b) means a payment that in-

[6] *Winant* v. *Gardner*, 29 F. 2d 836 (C. C. A. 2d); *Harrison* v. *Llewellyn*, 28 F. 2d 990 (W. D. Pa.), affirmed on other grounds, 35 F. 2d 283 (C. C. A. 3d). See also *United States* v. *Cuba Mail S. S. Co.*, 200 U. S. 488; *Girard Trust Co.* v. *United States*, 270 U. S. 163.

volved erroneous or illegal action on the part of the administrative officials. Any overpayment, whether made voluntarily by the taxpayer on the original return or as a result of an additional assessment made by the Commissioner, is a tax "erroneously or illegally assessed or collected" and it may be recovered if a claim is filed within the prescribed time after the tax is paid and the amount allowed does not exceed the portion of the tax paid within such period.

In *Blair* v. *Birkenstock*, 271 U. S. 348, this Court had occasion to consider this phrase "erroneously or illegally assessed or collected" in connection with a claim for interest under Section 1019 of the Revenue Act of 1924.[1] In that case the taxpayer had filed a return making quarterly payments, as she was permitted to do under the Act. She later filed a claim for refund for part of the original tax; this claim was allowed by the Commissioner and the refund was paid with interest. The taxpayer contended that she had received insufficient interest and that as each of the quarterly installments paid was in excess of one quarter of the proper amount of the tax for the year, interest allowed on the refund should have been computed on the excess of each quarterly payment from the date on which

[1] That Section provides that upon the allowance of a credit or refund "of any internal revenue tax erroneously or illegally assessed or collected" interest should be allowed and paid from the date such tax was paid to the date of the allowance of the refund.

it was paid. This Court, however, held that such overpayment became a "tax erroneously or illegally assessed or collected" only when the amount paid added to the previous quarterly payments exceeded the whole tax due for the year. The Court said (271 U. S. at p. 353):

> Payments in excess of the total amount of the tax, then and subsequently made, are subject to refund or credit under the provisions of § 1019, and interest must be allowed on them at the rate of 6 per cent., from the date of payment.

In *Hills* v. *United States*, 8 F. Supp. 849 (C. Cls.), the Court of Claims, in holding that under Section 3228 of the Revised Statutes prior to the amendment made by the 1932 Act (referred to above, p. 15), the estate tax should be treated as a whole and a claim for refund filed within four years from the payment of any part thereof was sufficient to allow recovery of any part of the tax, also had occasion to discuss the meaning of the words "alleged to have been erroneously or illegally assessed or collected." It stated (8 F. Supp. at p. 853):

> These words were inserted to carry out the purpose expressed in section 3220 (26 USCA § 149), which gave the Commissioner authority to remit, refund, or pay back all taxes erroneously or illegally assessed or collected, and had for their object the requirement that the taxpayer set forth in his claim the facts and grounds upon which

he relied to entitle him to the refund of the amount claimed. We think it is clear, therefore, that these words cannot be construed to limit the amount which the taxpayer may recover to that portion of the tax collected within the preceding four years. Section 3228, so far as it concerns the question now under consideration, has not been materially changed since its enactment in section 44 of the Act of June 6, 1872, entitled "An Act to reduce Duties on Imports, and to reduce Internal Taxes, and for other Purposes." 17 Stat. 230, 257. A consideration of the conditions existing at the time of its enactment and the decisions which had been rendered with reference to the requirement of a specific protest, as a condition to the right to recover amounts exacted in certain circumstances by agents of the government, and a proper consideration of the words "alleged to have been erroneously or illegally assessed or collected," show that Congress intended to impose upon the taxpayer the obligation of alleging grounds sufficient to show that there had been an erroneous or illegal exaction in respect of the total amount claimed. Compare *Cary* v. *Curtis*, 3 How. 236, 11 L. Ed. 576; *Curtis's Administratrix* v. *Fiedler*, 2 Black, 461, 17 L. Ed. 273; *Nichols* v. *United States*, 7 Wall. 122, 19 L. Ed. 125; *Collector* v. *Hubbard*, 12 Wall. 1, 20 L. Ed. 272; and *Erskine* v. *Van Arsdale*, 15 Wall.

> 75, 21 L. Ed. 63. Without the words "alleged to have been erroneously or illegally assessed or collected," the section might have been subject to the construction that a refund claim alleging no grounds to show that the amount claimed was erroneously or illegally exacted would be a sufficient claim under the statute. * * *

Petitioners' contention that the period of limitations does not begin to run until the Collector takes some action in assessing the tax which is erroneous or illegal would, if carried to its logical conclusion, be an exceedingly harsh rule for taxpayers. The ordinary practice, as is well known, is for a taxpayer to file his return and pay the tax due thereon. The tax is not assessed until later and the taxpayer ordinarily does not know when the actual assessment is made. The time of assessment is therefore an unsatisfactory date. Moreover, the petitioners would contend that even if an additional assessment were paid within three years before the filing of a claim, the taxpayer could not recover any of the tax attributable to an error on the original return. Also according to the theory now advanced by petitioners, interest should run not from the date of the overpayment (cf. *Blair* v. *Birkenstock*, 271 U. S. 348) but from the date of the assessment since it was not until that date that the tax became one "erroneously or illegally assessed or collected."

Such a construction would upset a long established administrative practice.[8]

In this connection it should be noted that in March 1935, the Commissioner assessed the tax in the amount of $80,224.24 and the petitioners say (Br. 12) that this action of the Commissioner was neither erroneous nor illegal. However, on their theory, if petitioners were seeking to recover any part of the amount of $80,224.24, then they would undoubtedly be obliged to allege that the Commissioner acted erroneously or illegally in assessing the amount and hence that the time ran from that date. With regard to the situation in March 1935, petitioners state (Br. 12, fn. 7) that the Government officials would have paid the remaining amount of $39,775.76 over to them at their request. If so, it would seem that a cause of action accrued at that time and not later when the deficiency was assessed and the claim here would be barred even on the petitioners' own theory. It is true that they attempt to meet this argument by suggesting (Br. 12, fn. 7) that the six-year period of limitation provided by Section 156 of the Judicial Code applies. But this suit was brought for the recovery of internal revenue taxes and it is governed by the express limitations applicable to such suits. *United States* v. *A. S. Kreider Co.*, 313 U. S. 443.

[8] Treasury Regulations 65, promulgated under the Revenue Act of 1924, provide that interest runs in the case of a refund from the date the tax, penalty, or sum is paid. Regulations under the later Acts contain similar provisions.

We submit, therefore, that the Court of Claims was correct in holding that this case turns on the time of payment of the tax, just as Section 319 (b) plainly provides.

2. Assuming that both the limitation as to time of filing the claim and the limitation as to the amount of recovery under Section 319 (b), as amended, are based solely on the time of payment of the tax, it will be noted that there are several dates on which the tax of $120,000 might conceivably be said to have been paid: (1) December 24, 1934, when the check for $120,000 was actually delivered; (2) February 25, 1935, when the estate tax return was filed; (3) March 22, 1935, when the assessment of $80,224.24 was made; and (4) April 22, 1938, when the deficiency was assessed and $39,775 of the $120,000 payment credited against it. While we take the position that the whole $120,000 was paid in December 1934, it will be noted that the petitioners could not prevail even if it were held that this payment was made in 1935. Their case depends on holding that the payment was made in 1938.

It is not disputed that the payment of $120,000 was actually made on December 24, 1934. Moreover, as we subsequently point out, the payment was made at a time when the estate tax was immediately due and payable, though an extension for the filing of the return had been secured. Under those circumstances, we submit that the 1934 payment should be regarded as payment of the tax.

Section 305 (a) of the Revenue Act of 1926, *supra*, p. 3, provides that the estate tax shall be "due and payable" one year after the decedent's death and shall be paid by the executor to the Collector. An extension for payment may be granted by the Commissioner not to exceed five years, but if the time is so extended, interest is collectible from the expiration of six months after the due date to the expiration of the period of extension. Section 305 (b) and (c), *supra*, pp. 3–4.

Section 304 (a) (*supra*, pp. 2–3) requires the executor to notify the Collector of the decedent's death within two months after the date of the decedent's death or within two months after qualifying as executor and to file the return at such time and in such manner as may be required by regulations made pursuant to law. Article 63 of Regulations 80, *supra*, pp. 4–5, requires that the return be filed within one year after the date of death, or in any particular instance at such time prior to the expiration of such year as the Commissioner may designate.

Article 69 of Treasury Regulations 80, *supra*, pp. 5–6, provides that the time for filing the return may be extended but that such an extension does not in and of itself operate to extend the time for the payment of the tax which is due one year after decedent's death. Both Section 304 (a) of the Revenue Act of 1926 and Article 64 of Treasury Regulations 80 (*supra*, pp. 2–3, 5) apparently take cognizance of the fact that the executors may

not be able definitely to ascertain the tax liability when the return is filed. Section 304 (a) provides that the return shall set forth certain information including—

> the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Article 64 (*supra*, p. 5) requires the executor to give as complete information as he has available. There can be no doubt that in a great many instances the estate tax may not be definitely determined within one year after the decedent's death. However, the fact that the correct tax cannot be definitely determined does not relieve the executors from filing the return and paying the estimated tax within the prescribed period. When, therefore, an amount is paid by the executors to the Collector at a time when, under Section 305 (a) (*supra*, p. 3) a tax is immediately due and payable, it would seem logical that this should be the date of payment of the tax under the limitations Section of the same statute (Section 319 (b), as amended, *supra*, p. 4), even though it should be later determined that the executors should have paid more or less than that amount.

Even if, as contended by petitioners in the court below, there must be an intention on the part of the taxpayer to satisfy and extinguish its tax obligation and the intention of the United

States to accept the payment in satisfaction and extinguishment of the tax,[9] we submit that the evidence in this case shows an intention to pay the tax on the date the check was delivered to the Collector, even though the exact amount was not known. See *Estate of Rogers* v. *Commissioner*, decided May 12, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42,275). The tax here was due on or before December 25, 1934, and when the payment was made on December 24, the tax was due and owing although it was impossible to determine the exact amount. The petitioners had requested an extension of time for filing the return and this had been granted by the Commissioner, but his letter of December 15, 1934, granting the extension advised petitioners that the payment of the tax was not postponed by the extension and suggested that payment be made to avoid penalty and interest (R. 6–7). Petitioners accordingly transmitted their check stating that it was sent "as a payment on account of the Federal Estate tax" (R. 7). The statement in the letter of transmittal (R. 7) that the payment was made under duress, and that it "is contended by the executors that not all of this sum is legally or lawfully due" was probably made to satisfy the former requirement that only taxes paid under

[9] Cf. *American Hide & L. Co.* v. *United States*, 284 U. S. 343, 347, in which the Court said:

> The object of the payment is in each instance defined by the intention of the taxpayer, to be ascertained from all the relevant facts and circumstances.

protest could be subsequently refunded in a lawsuit. Furthermore, it did not indicate that the petitioners were paying more than they estimated that the return would disclose; and in any event the letter could not toll the statutes of limitations. If they had made any such statement, the Collector might have been justified in refusing to accept the check, but here he had no reason to do so.

There is no significance to be attached to the fact that the Collector retained the amount of $39,775.76 in Account 9 to the credit of the estate until April 1938. This was simply a matter of bookkeeping. Account 9 is an account to which payments are credited if no assessment against the person making such payment is outstanding and all payments placed in this account are deposited by the Collector as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections applied immediately to some account on the collection list. Petitioners contend (Br. 12–16) that the balance of $39,775.76 was being retained as a deposit to secure the payment of any additional tax that might be due. However, the Collector treated it not as a deposit but as a payment of tax. When the additional deficiency of $48,534.84 was determined and assessed and the amount of $39,775.76 applied against it, no interest was assessed against the petitioners on the latter amount as required by Section 308 (h) of the Revenue Act of 1926, providing that interest

upon the amount determined as a deficiency shall be paid and collected "from the due date of the tax to the date the deficiency is assessed, * * *." Interest was assessed and paid on the remainder of the deficiency. (R. 9.) This failure to demand or pay interest is indicative of the fact that the parties were treating the amount of $39,775.76 as having been "paid" as a part of the estate tax liability on December 24, 1934, for otherwise petitioners would have owed interest from that date, or at least from December 25, 1934, the due date of the tax.

It is true that under similar circumstances in cases involving the question of the interest allowable "upon any overpayment in respect of any internal revenue tax" within the meaning of Section 3771 of the Internal Revenue Code or similar provisions of earlier statutes, the Government has taken the position that the excess of a payment made in advance of the filing of the return over the tax subsequently determined to be due is not an overpayment, and in those cases it was argued that the excess was a deposit. The decisions in the interest cases, however, have not been uniform, and as we shall subsequently point out, that issue has now been settled by Congress in a manner that is completely consistent with the position taken in this case. In *Busser* v. *United States*, 130 F. 2d 537 (C. C. A. 3d), and *Moses* v. *United States*, 28 F. Supp. 817 (S. D. N. Y.), two cases involving estate taxes, it was

held that the taxpayer was not entitled to interest, but in *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766 (C. Cls.), interest was allowed. See also Memorandum Opinion of the Tax Court in *Estate of Rogers* v. *Commissioner*, decided May 12, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42,275) which, while not dealing with interest, held that the advance payment was included in the overpayment. It was also allowed in *Chicago Title & Trust Co.* v. *United States*, 45 F. Supp. 323 (N. D. Ill.), though the latter case involved payment of a tentative deficiency and was distinguished in the *Busser* case on that ground. The theory in the *Busser* case was that the sovereign was not liable for interest in the absence of clear statutory authority (see *Tillson* v. *United States*, 100 U. S. 43, 47; *United States* v. *North Carolina*, 136 U. S. 211) and that at the time the check was sent nothing was due and the remittance of the tax was voluntary. On the other hand, the Court of Claims in the *Atlantic Oil Producing* case said that the only requirement was that the payment be made "in respect of any internal revenue tax," that the payment involved was made in respect of the capital stock tax, and when it turned out that the payment was too great, it was an "overpayment" within the meaning of the statute.

The rule of construction that the sovereign is not liable for interest in the absence of clear statutory authority may have justified resolving

the doubt in favor of the Government in the *Busser* and *Moses* cases. Here the statute is one limiting the right to sue the United States, and the applicable rule of construction is that statutes prescribing the conditions under which the United States consents to be sued should receive a strict construction in favor of the United States. *United States* v. *Sherwood*, 312 U. S. 584, 590; *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141. Statutes requiring that a claim for refund be filed within a prescribed period have in general been strictly construed[10] and while the Government may waive requirements as to form (*Tucker* v. *Alexander*, 275 U. S. 228; *United States* v. *Kales*, 314 U. S. 186), it cannot waive requirements as to time. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United States* v. *Andrews*, 302 U. S. 517. If, however, the two statutes should be construed similarly on the theory that both rest in final analysis on the time of payment of the tax, the decisions on the interest questions are quite inconclusive and Congress has apparently solved the interest question for the fu-

[10] For example, it has been held that a tax claim filed after the specified period of years from the date a check in payment of the tax is deposited with the Collector is too late, even though the check was cashed within such period. *Second Nat. Bank* v. *United States*, 42 F. 2d 344 (C. Cls.); *B. Altman & Co.* v. *United States*, 40 F. 2d 781 (C. Cls.), certiorari denied, 282 U. S. 863; *Whitehall Lunch Club* v. *United States*, 9 F. Supp. 132 (C. Cls.). Cf. *Bryan* v. *United States*, 99 F. 2d 549 (C. C. A. 10th), certiorari denied, 305 U. S. 661.

ture in a manner consistent with the decision in the *Atlantic* case and with our position here.

While no material change in the statute relating to interest has been made (see Section 3771 of the Internal Revenue Code (26 U. S. C. Sec. 3771)), an amendment of Section 3770 of the Internal Revenue Code (26 U. S. C. Sec. 3770) made by Section 4 (d) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, apparently makes the decision in the *Busser* case inoperative. Section 3770, dealing with the authority of the Commissioner to make abatements, credits and refunds, was amended by adding a new subdivision (c) providing as follows:

> (c) *Rule Where No Tax Liability.*—An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

This provision is applicable to all overpayments and not merely to those made as a consequence of the new system of estimating income taxes and paying them in advance under the Current Tax Payment Act of 1943, though the new procedure made the question a more pressing one. The legislative history shows that the provision was designed to distinguish a situation where the tax is paid in advance pursuant to requirements of the law and a situation where money is merely dumped on the Collector with no relevance to

actual requirements. H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 48 (Appendix, *infra*, pp. 36–37).

It is obvious, for reasons previously indicated (*supra*, pp. 6–7, 26–27, 28, 29–30), that the payment here was made pursuant to requirements of the law and was not merely dumped on the Collector. That being true, under the Current Tax Payment Act, interest would be due on any overpayment from December 24, 1934. If the same principles are to be applied in determining when the tax was paid for the purpose of determining the limitation upon the period for filing refund claims, and the amount of recovery, then all of the tax here except for the sum of $10,497.34 was paid on December 24, 1934, the claim for refund was filed more than three years thereafter, and no recovery except of $10,497.34 is allowable.

As we have hitherto pointed out (*supra*, pp. 13–14, 25), the claim was too late even if $120,000 of the tax were considered to have been paid either when the return was filed or when the original assessment was made in 1935. We think, however, that only December 24, 1934, the date of actual payment of this sum may be regarded as the date of payment of the tax. To hold, as petitioners contend, that the excess payment over the tax disclosed by the return does not become a payment of the tax until applied against a deficiency, leaves the status of the excess undetermined during the

interim. The Commissioner may not happen to assert a deficiency, or if he does, the deficiency may not absorb all of the advance payment that has not already been absorbed by the original assessment. Thus the applicable period of limitations would turn upon uncertainties. Orderly administration of the revenue laws requires that taxpayers know the limitations on filing claims for refund.

CONCLUSION

Since the petitioners' claim for refund was not filed within the statutory period, they are not entitled to recover any of the amount paid on December 24, 1934, and the decision of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1944.

APPENDIX

H. Conference Rep. No. 510, 78th Cong., 1st sess., reads in part as follows (p. 48):

> Section 4 (d) of the Senate bill adds new subsection (c) to section 3770 of the code. Under this provision an amount paid as tax shall not be considered not to constitute an overpayment solely because there was no tax liability in respect of which that amount was paid.
>
> The income-tax law requires the taxpayer to make a return of his tax and to pay the tax so returned. These requirements contemplate that in the discharge of these duties at the time, place, and manner prescribed, honest mistakes will occur—mistakes both as to the amount of the tax and as to the existence of any tax liability; and that such honest mistakes made incident to the bona fide orderly compliance with the actual or reasonably apparent duties of the taxpayer are to be corrected under the provisions of law governing overpayments. It is believed that existing law so provides. The language of certain court decisions (holding that certain payments, not made incident to a bona fide and orderly discharge of actual or reasonably apparent duties imposed by law, are not overpayments and accordingly that interest is not payable) has been read by some as meaning that no payment can result in an overpayment if no tax liability actually existed. It is not believed that such reading is in any

way a statement of existing law. The provisions of the bill, however, emphasize the need for clarity in this regard.

Under the bill as passed by the Senate, two requirements become basic features of the income tax: (1) The declaration and payment of the estimated tax; and (2) the withholding and collection by the employer of tax from the wages of employees, and the return and payment as such of the amount by the employer to the Government. Honest mistakes incident to faithful and orderly compliance will, of course, occur, just as they have in the older procedures of the tax. The doubts expressed as to the existence of an overpayment in case it ultimately turns out that there is no tax, it is believed should be put to rest, and to this end the amendment to section 3770 of the code was inserted in the Senate bill. It is thought that the code does not contemplate that liability for interest can be cast on the Government by merely dumping money as taxes on the collector, by disorderly remittances to him of amounts not computed in pursuance of the actual or reasonably apparent requirements of the code, or not transmitted in accordance with the procedures set up by the code, or by other abuses of tax administration. As to these, a proper application of existing law will enable the courts, in the future as generally in the past, to deny treatment as overpayments to these improper payments.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 207.—October Term, 1944.

Lena Rosenman and the National City Bank of New York, a Corporation, as Executors of the Last Will and Testament of Louis Rosenman, Deceased, Petitioners,
vs.
The United States.

On Writ of Certiorari to the Court of Claims.

[January 29, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an action upon a claim for refund of a federal estate tax, and the specific question before us is whether the claim was asserted too late. The matter is governed by § 319(b) of the Revenue Act of 1926, 44 Stat. 9, 84, as amended by § 810(a) of the Revenue Act of 1932, 47 Stat. 169, 282, 26 U. S. C. § 910, reading as follows:

"All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

Petitioners are executors of the will of Louis Rosenman, who died on December 25, 1933. Under appropriate statutory authority, the Commissioner of Internal Revenue extended the time for filing the estate tax return to February 25, 1935. But there was no extension of the time for payment of the tax which became due one year after the decedent's death, on December 25, 1934. The day before, petitioners delivered to the Collector of Internal Revenue a check for $120,000, the purpose of which was thus defined in a letter of transmittal: "We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax. . . . This payment is made under protest and duress, and solely

for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." This amount was placed by the Collector in a suspense account to the credit of the estate. In the books of the Collector the suspense account concerns moneys received in connection with federal estate taxes and other miscellaneous taxes if, as here, no assessment for taxes is outstanding at the time. On February 25, 1935, petitioners filed their estate tax return according to which there was due from the estate $80,224.24. On March 28, 1935, the Collector advised petitioners that $80,224.24 of the $120,000 to their credit in the suspense account had been applied in satisfaction of the amount of the tax assessed under their return. On the basis of this notice, petitioners, on March 26, 1938, filed a claim for $39,775.76, the balance between the $120,000 paid by them under protest and the assessed tax of $80,224.24.

Upon completion, after nearly three years, of the audit of the return, the Commissioner determined that the total net tax due was $128,759.08. No appeal to the Board of Tax Appeals having been taken, a deficiency of $48,534.84 was assessed. The Collector thereupon applied the balance of $39,775.76 standing to the credit of petitioners in the suspense account in partial satisfaction of this deficiency, and on April 22, 1938, petitioners paid to the Collector the additional amount of $10,497.34, which covered the remainder of the deficiency plus interest. The Commissioner then rejected the petitioners' claim for refund filed in March of that year. On May 20, 1940, petitioners filed with the Collector a claim, based on additional deductions, for refund of $24,717.12. The claim was rejected on the ground, so far as now relevant, that the tax claimed to have been illegally exacted had been paid more than three years prior to the filing of the claim, except as to the amount of $10,497.34 paid by petitioners in 1938. Petitioners brought this suit in the Court of Claims which held that recovery for the amount here in dispute was barred by statute, 53 F. Supp. 722. To resolve an asserted conflict of decisions in the lower courts we brought the case here. 323 U. S. —.

Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the

payment of such tax." On the face of it, this requirement is couched in ordinary English, and since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. The claim is for refund of a tax "alleged to have been erroneously or illegally assessed or collected", and the claim must have been filed "after the payment of such tax", that is, within three years after payment of a tax which according to the claim was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and "payment of such tax" plainly presupposes challenged action by the taxing officials.

The action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes "erroneously or illegally assessed or collected" for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the additional payment of $10,497.34 on April 22, 1938. Both these events occurred within three years of May 20, 1940, when the petitioners' present claim was filed.

But the Government contends "payment of such tax" was made on December 24, 1934, when petitioners transferred to the Collector a check for $120,000. This stopped the running of penalties and interest, says the Government, and therefore is to be treated as a payment by the parties. But on December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until April 1938. And this is the practical construction which the Government has placed upon such arrangements. The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts established for depositing money received when no assessment is then outstanding against the tax-

payer. The receipt by the Government of moneys under such an arrangement carries no more significance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due. See Ruling of the Comptroller General, A-48307, April 14, 1933, 1 (1935) Prentice-Hall Tax Service, Special Reports, paragraph 45. Accordingly, where taxpayers have sued for interest on the "overpayment" of moneys received under similar conditions, the Government has insisted that the arrangement was merely a "deposit" and not a "payment" interest on which is due from the Government if there is an excess beyond the amount of the tax eventually assessed. See *Busser* v. *United States*, 130 F. 2d 537, 538; *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766; *Moses* v. *United States*, 28 F. Supp. 817; *Chicago Title & Trust Co.* v. *United States*, 45 F. Supp. 323; *Estate of Rogers* v. *Commissioner*, 1942 Prentice-Hall B. T. A. Memorandum Decisions, paragraph 42,275. If it is not payment in order to relieve the Government from paying interest, it cannot be payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government. See *United States* v. *Wurts*, 303 U. S. 414.

Exaction of interest from the Government requires statutory authority, and it merely carries out the true nature of an arrangement such as this to treat it as an estimated deposit and not as a payment which, if in excess of what should properly have been exacted, entitled the taxpayer to interest as the return on the use that the Government has had of moneys that should not have been exacted. (We need not here consider the effect of the Current Tax Payment Act of 1943, § 4(d), 57 Stat. 126, 140.) On the other hand, by allowing such a deposit arrangement, the Government safeguards collection of the assessment of whatever amount tax officials may eventually find owing from a taxpayer, while the taxpayer in turn is saved the danger of penalties on an assessment made, as in this case, years after a fairly estimated return has been filed. The construction which in our view the statute compels safeguards the interests of the Government, interprets a business transaction according to its tenor, and avoids gratuitous resentment in the relations between Treasury and taxpayer.

Reversed.

on a subsequently determined excess,